No. 99-244-CFX Title: Mobil Oil Exploration and Producing Southeast, Inc., Petitioner
v.
United States

Docketed:
August 10, 1999 Court: United States Court of Appeals for the Federal Circuit

Vide:
99-253

Entry	Date	Proceedings and Orders
	Aug 10 1999	Petition for writ of certiorari filed. (Response due October 12, 1999)
	Sep 3 1999	Order extending time to file response to petition until October 12, 1999.
	Oct 12 1999	Brief amicus curiae of American Petroleum Institute filed. VIDED.
	Oct 12 1999	Brief of respondent United States in opposition filed. VIDED.
	Oct 21 1999	Reply brief of petitioner Mobil Oil Exploration & Producing Southeast, Inc. filed.
	Oct 27 1999	DISTRIBUTED. November 12, 1999
	Nov 15 1999	Petition GRANTED. The cases are consolidated and a total of one hour is allotted for oral argument. SET FOR ARGUMENT March 22, 2000.
		**********
	Dec 15 1999	Order extending time to file the joint appendix and petitioners' brief on the merits to and including January 6, 2000.
	Dec 30 1999	Brief of petitioner Marathon Oil Company filed. VIDED.
	Dec 30 1999	Brief amicus curiae of American Petroleum Institute filed. VIDED.
	Jan 4 2000	Brief of petitioner filed.
	Jan 5 2000	Joint appendix filed.
	Jan 13 2000	CIRCULATED.
	Jan 20 2000	Record filed.
	Jan 28 2000	Brief of respondent United States filed. VIDED.
	Feb 3 2000	Brief amici curiae of California, et al. filed. VIDED.
	Feb 11 2000	Record filed.
	Mar 1 2000	Reply brief of petitioner Marathon Oil Company filed. VIDED.
	Mar 1 2000	Reply brief of petitioner Mobil Oil Exploration and Producing Southeasst, Inc. filed. VIDED.
	Mar 22 2000	ARGUED.

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No. 99-____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1999

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,
Petitioner,

v.

THE UNITED STATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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August 1999

QUESTION PRESENTED

Whether the Federal Circuit erred in holding–contrary to decisions of this Court, other courts of appeals, and state courts, as well as the *Restatements* and leading treatises–that petitioner could not receive restitution of the $78 million paid to the United States for oil and gas leases following the enactment of a statute, which the trial court found "clearly reduce[d] the value and materially alter[ed] the structure and framework" of those leases, because (1) petitioner had not proved that this material breach of its leases caused it any injury and (2) Congress repealed the statute after petitioner filed suit asserting material breach?

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE

The following were parties to the proceeding in the court of appeals: The United States, Mobil Oil Exploration & Producing Southeast, Inc., and Marathon Oil Company.

All of the stock of Mobil Oil Exploration & Producing Southeast, Inc., is owned by its immediate parent, Mobil Exploration & Producing North America Inc. All of the stock of Mobil Exploration & Producing North America Inc. is, in turn, owned by Mobil Corporation, the ultimate parent of Mobil Oil Exploration & Producing Southeast, Inc. Mobil Corporation is a publicly held company.

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PETITION FOR WRIT OF CERTIORARI

Mobil Oil Exploration & Producing Southeast, Inc. ("Mobil") respectfully petitions this Court for a Writ of Certiorari to review a decision of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The initial opinion of the court of appeals is reported at 158 F.3d 1253. Appendix ("App.") 22a. The revised opinion of the court of appeals is reported at 177 F.3d 331. App. 1a. The order of the court of appeals granting the petition for rehearing for the limited purpose of revising the court's initial opinion and denying Mobil's suggestion for rehearing in banc is also reported at 177 F.3d 331. App. 94a. The April 1, 1996, opinion of the United States Court of Federal Claims, which was reversed by the court of appeals, is reported at 35 Fed. Cl. 309. App. 40a.

JURISDICTION

The decision of the court of appeals that is the subject of this petition was entered May 13, 1999. That decision revised the court of appeals' October 15, 1998, decision pursuant to a timely petition for rehearing filed on November 25, 1998. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1340(c)(1) of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1340(c)(1), provides in pertinent part:

> The Secretary [of the Interior] shall approve [a] plan [of exploration], as

submitted or modified, within thirty days of its submission, except that the Secretary shall disapprove such plan if he determines that (A) any proposed activity under such plan would result in any condition described in section 1334(a)(2)(A)(i) of this title [*i.e.*, that the proposed activity "would probably cause serious harm or damage to . . . the marine, coastal, or human environment"], and (B) such proposed activity cannot be modified to avoid such condition.

Section 6003(c) of the Outer Banks Protection Act ("OBPA"), Pub. L. No. 101-380, § 6003, 104 Stat. 484, 555, *repealed by* Pub. L. No. 104-134, 110 Stat. 1321-177 (April 26, 1996), provides in pertinent part that:

(c)(1) The Secretary of the Interior shall not –

***

(C) approve any exploration plan;

(D) approve any development and production plan;

(E) approve any application for permit to drill; or

(F) permit any drilling for oil or gas under the [OCSLA] on any lands of the Outer Continental Shelf offshore North Carolina.

***

(3) The prohibition under paragraph (1) shall remain in effect until the later of –

(i) October 1, 1991; or

(ii) 45 days of continuous session of the Congress after submission of a written report to the Congress by the Secretary of the Interior, made after consideration of the findings and recommendations of the Environmental Sciences Review Panel under subsection (e) . . . .

STATEMENT OF THE CASE

Mobil paid the United States more than $78 million in 1981 to acquire a one-third interest in oil and gas leases on the Outer Continental Shelf ("OCS") offshore North Carolina. A. 180-81, 183-84. In 1990, Congress enacted the OBPA which the Court of Federal Claims characterized as "compel[ing] governmental breach by non-performance accompanied by an anticipatory repudiation thereby giving a rise to 'total breach.'" App. 71a. In a decision that ignores settled contract law, conflicts with a recent Ninth Circuit decision, and undermines billions of dollars of Government contracts, the Federal Circuit held that Mobil was not entitled to rescission and restitution of the monies that it had paid to the Government for its leases because it had not proved that the OBPA was the exclusive cause of Mobil's inability to exploit the oil and gas resources on the North Carolina OCS.

The Facts Giving Rise To This Case

In 1989, Mobil, acting on behalf of seven other energy companies that had also purchased interests in OCS leases, agreed with the Department of the Interior ("DOI") and the State of North Carolina to delay submission of a final

plan of exploration ("POE") for what would have been the first exploratory well offshore North Carolina in order to give DOI an opportunity to prepare an analysis of the environmental impacts associated with that well. A. 263-66. The 2000-page Environmental Report produced by DOI in June 1990 constitutes "the most extensive and intensive environmental examination that had ever been afforded an exploration well in the OCS program." A. 949-50. After reviewing that report, DOI determined that Mobil's proposed exploration would not result in any significant environmental impacts. A. 950, 962.

Under the OCSLA, 43 U.S.C. § 1340(c)(1), the Secretary was required to approve Mobil's POE within 30 days unless he found that the proposed activities would probably cause serious harm to the environment. However, the OBPA was enacted on August 18, 1990, before that approval. That Act prohibited DOI from approving any North Carolina OCS POE or any other permit to drill until the later of October 1, 1991, or 45 days of continuous congressional session following the Secretary's submission to Congress of a certificate that he had received a report from the science review panel established by the OBPA and had concluded that sufficient information was available to allow him to carry out his responsibilities under the OCSLA. The OBPA was regarded by DOI officials at the highest levels as an act of "bad faith," lacking any scientific basis, that was inconsistent with the terms of Mobil's OCS leases. A. 954-55.

The OBPA scientific panel did not submit its report until January 1992. A. 318. After receiving that report, Secretary Lujan certified in April 1992 that current information was adequate, but he nonetheless refused to approve Mobil's POE until completion of the two studies recommended by the OBPA panel. A. 414-15. Those studies were not completed until July 1994. A. 533.

Moreover, Secretary Lujan's decision dealt only with the first Manteo exploratory well, A. 415, and the OBPA panel determined that additional studies would be required before deciding whether to permit any of the numerous additional wells that would be required to explore and develop the area. A. 412-15.

Mobil faced another potential barrier to drilling its first exploration well based upon the Coastal Zone Management Act ("CZMA"). Pursuant to 16 U.S.C. § 1456(c)(3)(B), North Carolina on November 19, 1990, objected to Mobil's POE.[1] North Carolina did not object to OCS exploration per se, but instead argued (based in large part upon the OBPA) that there were insufficient environmental studies to proceed with drilling. A. 316. Under the CZMA, DOI was, accordingly, barred from issuing the drilling permit contemplated by Mobil's POE, unless Mobil successfully appealed North Carolina's objection to the Secretary of Commerce or amended its POE to achieve consistency by conducting the additional studies demanded by North Carolina. On September 2, 1994, the Secretary of Commerce rejected Mobil's appeal.[2]

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[1] On July 17, 1990, North Carolina similarly objected to EPA's issuance of a permit under the Clean Water Act ("CWA"), 33 U.S.C. § 1311, for the discharges into ocean waters associated with exploration. A. 280. Unlike the State's later objection to Mobil's POE, North Carolina's objection to the CWA permit would not necessarily have barred exploratory drilling. *See* A. 518 (discussing the State's proposal for a "no discharge" CWA permit contemplating the barging of discharges to shore).

[2] Mobil and the other lessees filed an action in U.S. District Court challenging the Secretary of Commerce's rejection of the CZMA appeal. The District Court has remanded the case to the Secretary of Commerce for a determination whether the administrative record should be reopened to receive the two completed studies required by the OBPA scientific review panel. (...continued)

Proceedings In The Court Of Federal Claims

Confronted with Secretary Lujan's April 1992 decision interpreting the OBPA as requiring years of additional studies not only for the first exploration well offshore North Carolina, but also for every subsequent exploration, delineation, and production well, Mobil and all the other North Carolina OCS lessees filed suit under 28 U.S.C. § 1491 in the United States Court of Federal Claims. They alleged, *inter alia*, that the enactment and application of the OBPA constituted a material breach by anticipatory repudiation of their leases which entitled them to restitution of all the monies which they had paid to acquire and maintain the leases. The Government defended principally on the ground that under the terms of the OCS leases, as construed pursuant to the unmistakability and sovereign acts doctrines,[3] the lessees could not properly complain of the application of the OBPA to their leases even though it was enacted years after the leases were acquired.

On April 1, 1996, the Court of Federal Claims issued its opinion granting summary judgment for Mobil and the other plaintiffs on their material breach theory. App. 40a. Addressing the Government's principal argument, the court held that Mobil and the other companies' OCS leases were not subject to something as unforeseeable as the OBPA, App. 59a-64a, which "specifically targeted plaintiffs and prevented them from exercising their lease rights," App. 91a. The Court, therefore, concluded that the OBPA constituted an

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[3] *See generally United States v. Winstar Corp.*, 518 U.S. 839 (1996).

anticipatory repudiation and material breach of the companies' OCS leases:

> Clearly, the OBPA imposed severe, burdensome, new conditions upon the DOI's obligation under OCSLA to approve POEs offshore North Carolina, which were not contemplated by the parties when the leases were executed. Therefore . . . compliance with the OBPA compelled governmental breach by non-performance accompanied by an anticipatory repudiation thereby giving rise to "total breach."

App. 71a; *see also* App. 63a (OBPA "clearly reduce[d] the value and materially alter[ed] the structure and framework of plaintiffs' North Carolina lease acquisitions").[4]

Following additional proceedings regarding remedy, judgment was entered for Mobil in the amount of $78,257,565, A. 101 – restitution (without interest) of the bonus monies Mobil paid to the Government in 1981 to acquire its interest in the North Carolina leases.[5]

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[4] The Government paid so little attention to the CZMA in briefing and arguing summary judgment that the court did not directly address that statute. It did hold, however, that because the OBPA "legislatively barred [DOI] from performing," it was "not necessary for plaintiff [even] to have actually submitted such exploration plans because it is clear defendant cannot and will not perform its end of the bargain as required by the OCSLA." App. 73a. Had Mobil simply filed suit without filing a POE or seeking permits from EPA under the CWA, the CZMA would never have come into play in this case.

[5] Judgment in a slightly smaller amount was similarly entered on behalf of Marathon Oil Company. A. 102.

Proceedings In The Federal Circuit

The Government appealed to the Federal Circuit. However, in that court the Government abandoned its principal argument below based on the sovereign acts and unmistakability doctrines, thus conceding that the OBPA was inconsistent with Mobil's leases. Instead, the Government argued that under the OCSLA it had the authority to delay grant of permits needed to drill for oil and gas off North Carolina. The Government also argued that Mobil had effectively waived any material breach occasioned by the OBPA by virtue of its continued efforts to achieve approval of its POE. Lastly, the Government argued that the OBPA could not sustain Mobil's arguments for material breach and restitution because Mobil was independently barred by the CZMA from obtaining the permits necessary to conduct exploration. In advancing this argument, the Government did not contend that the April 26, 1996, repeal of the OBPA (nearly a month after the Court of Federal Claims' decision) could in any way relieve it from liability for the material breach declared by that court.[6]

Nonetheless, on October 15, 1998, a majority of the Federal Circuit panel (Judges Plager and Schall, with Judge Newman dissenting) reversed the judgment below and rested its decision exclusively upon the impact of the CZMA on Mobil's POE and the repeal of the OBPA. Characterizing Mobil as seeking to recover damages for the "delay" in approving its POE introduced by the OBPA, the panel majority held that the CZMA consistency objections were independent causes of delay and cited five cases holding that

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[6] *See* 141 Cong. Rec. H9443, daily ed. (Sept. 21, 1995) ("The repeal [of the OBPA] is not intended to excuse the United States from the liabilities, if any, it has incurred to date nor to otherwise affect pending litigation").

claims for delay damages should be rejected where there is an independent cause of delay not attributable to the acts of the defendant. App. 33a-34a. To further support its denial of "delay damages," the panel majority construed the OCS leases as placing an obligation upon Mobil to achieve CZMA consistency and as giving the Government the right to cancel such leases in the event that consistency is not achieved. App. 31a-32a, 37a. The panel majority also relied upon a provision of the OCSLA, 43 U.S.C. § 1351(h)(2), which denies compensation under that Act if a CZMA consistency objection bars OCS development and production, as opposed to exploration. App. 36a-37a.[7]

Mobil sought panel rehearing and suggested rehearing in banc. The petition pointed out that the court had erred in characterizing restitution as "delay damages." Mobil also argued that the court had misconstrued the relevant provisions of the OCS leases with respect to its purported obligation to achieve CZMA consistency, as well as the OCSLA with respect to the award of compensation where a CZMA consistency objection bars OCS exploration.[8]

On May 13, 1999, the panel majority (with Judge Rader replacing Judge Schall, who recused himself on rehearing) issued a new opinion which excised the court's

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[7] Judge Newman's dissent followed the lines of one of the arguments advanced by Mobil in its brief: that a CZMA consistency objection would not preclude the restitution sought by the companies since, at most, it raised an issue of impossibility of performance which under settled law would require restitution of their bonuses. App. 38a-39a.

[8] As to the latter, Mobil showed that a CZMA consistency objection at the exploration stage is governed by 43 U.S.C. § 1340(c), which, unlike § 1351(h)(2), is silent regarding statutory compensation.

erroneous discussion of delay damages and its misconstruction of the OCS leases and the OCSLA, while offering no new rationale for the court's decision.[9] Stripped of the underpinnings provided in its initial opinion, the panel majority's ultimate decision was expressed as follows:

> The trial court viewed the moratorium imposed by the OBPA as having indefinite duration and unavoidable consequences. In fact, appellees' failure to overcome North Carolina's consistency objections resulted in a delay that preceded and extended throughout the period in which the OBPA was effective.

App. 13a. The court of appeals moved from this proposition to its ultimate conclusion two sentences later in its opinion:

> Appellees characterize the OBPA as constituting a "continuing, open-ended prohibition of *any* exploration of the North Carolina OCS and *any* development and production of oil and gas resources in that area." For the reasons noted, that is not a correct description of the OBPA.

App. 13a. Accordingly, the rationale for the court of appeals' decision in this case rests upon two related propositions – that the CZMA, not the OBPA, caused Mobil's damages and that the OBPA's repeal during the pendency of North

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[9] Judge Newman reiterated her dissent, albeit in more expansive terms. App. 17a-21a.

Carolina's CZMA objection absolved the Government from liability.[10]

REASONS FOR GRANTING THE WRIT

The panel majority's decision fundamentally misunderstands or ignores basic contract law principles established by this and other courts. In doing so, the decision conflicts with a recent decision of the Ninth Circuit and is out of step with this Court's decision in *United States v. Winstar Corp.*, 518 U.S. 839 (1996). Unless corrected by this Court, the decision below threatens to undermine the foundation for billions of dollars of private investment in contracts where parties, like Mobil here, have paid enormous up-front bonuses to the United States.

I. THE FEDERAL CIRCUIT'S DECISION IS CONTRARY TO UNIFORMLY ACKNOWLEDGED PRINCIPLES OF CONTRACT LAW

Both the Federal Circuit's original opinion and its "redacted" version are based upon the conclusion that North Carolina's CZMA consistency objection was an independent "cause" of Mobil's damages until the OBPA was repealed. The panel majority's reliance on the CZMA as the "cause" of Mobil's injury – and, relatedly, on the repeal of the OBPA while North Carolina's CZMA objection was still in place – confounds settled principles of contract law.

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[10] Five members of the Federal Circuit recused themselves. The remaining three who were not members of the panel voted to deny the suggestion for rehearing in banc. App. 94a-95a.

A. The Federal Circuit's Reliance Upon North Carolina's CZMA Consistency Objection As An Independent "Cause" Of Mobil's Injury Is Contrary To Principles Of Contract Law Uniformly Acknowledged By This And Other Courts.

The panel majority never questioned the Court of Federal Claims' express "find[ing]" that "the OBPA compelled governmental breach by non-performance accompanied by an anticipatory repudiation thereby giving rise to 'total breach.'" App. 71a. In fact, the panel majority *agreed* with that court's assessment that the OBPA could not be reconciled with the terms of Mobil's leases. App. 9a-10a. Moreover, the panel majority expressed no doubt that restitution is an appropriate remedy for a material breach by anticipatory repudiation. Instead, it held that Mobil was not entitled to such relief because it had "not established that [its] inability to obtain secretarial approval of the POE and to undertake exploratory activity was *caused* by the [OBPA] moratorium rather than by the fact that [it was] unable to provide the necessary state concurrence to [its] certification of CZMA compliance." App. 12a (emphasis added).

The panel majority's focus on causation would have been appropriate if Mobil were seeking "delay damages," as the panel majority mistakenly believed in its initial opinion. App. 33a-34a. But as Mobil pointed out in its rehearing petition and the panel majority effectively acknowledged in its revised opinion, Mobil was *not* seeking delay damages based upon DOI's failure to approve its POE within the 30 days specified by OCSLA § 1340(c). Instead, as Judge Newman correctly observed in her dissent, Mobil was seeking restitution for the Government's material breach. App. 17a.

It is a axiomatic that "on a repudiation, the injured party is entitled to restitution for any benefit that he has conferred on the other party." *Restatement (Second) of Contracts* § 373 (1981); *accord Restatement of Restitution* § 108(a) (1937) ("A person who has conferred a benefit upon another in the performance of a contract or bargain with the other which the other has failed to perform is entitled to restitution ... if the other has committed a material breach of contract."); 4 Arthur L. Corbin, *Corbin on Contracts* § 979, at 928 (1951) ("If a repudiation is recognized as a breach of contract, the injured party is given the alternative remedy of restitution ....").[11] This Court has long recognized this fundamental principle. *See Ankeny v. Clark*, 148 U.S. 345, 353 (1893):

> It is an invariably true proposition that whenever one of the parties to a special contract not under seal has, in an unqualified manner, refused to perform his side of the contract, or has disabled himself from performing it by his own act, the other party has thereupon a right to elect to rescind it, and may, on doing so, immediately sue on a quantum meruit for anything he had done under it previously to the rescission.

Other federal courts – including the Federal Circuit, which has ordered restitution in cases involving Government contracts requiring large advance deposits, *see Stone Forest*

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[11] Government contracts are controlled by the federal common law of contracts, *see United States v. Allegheny County*, 322 U.S. 174, 183 (1944), which, in turn, is informed by "the principles of general contract law." *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947).

Indus., Inc. v. United States, 973 F.2d 1548, 1550 (Fed. Cir. 1992) – have uniformly followed this principle.[12]

Contrary to all this authority, the panel majority concluded that North Carolina's CZMA consistency objection was an independent and supervening cause of Mobil's loss, which destroyed Mobil's right to restitution. But the question whether, in addition to the OBPA, the CZMA also contributed to Mobil's injury is irrelevant to Mobil's claim for restitution. None of the formulations of the rescission-and-restitution rule so much as hints that the aggrieved party must show that the breaching party's repudiation caused its loss. To the contrary, all make clear that the innocent party's right to rescind the contract and obtain restitution is absolute. *See, e.g.*, *Ankeny*, 148 U.S. at 353 (holding that "whenever" one party anticipatorily repudiates a contract, the other party has "thereupon" a "right" to rescind the contract and seek restitution); *Restatement (Second) of Contracts* § 373 (1981) (stating that upon a repudiation an injured party is "entitled" to restitution). This is in marked contrast to the role that causation plays in the context of "expectation" damages, where "[t]he injured party is limited to damages based on his actual loss caused by the breach" and "[r]ecovery can be had

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12 *See, e.g., Elyea v. RCA Victor Co.*, 79 F.2d 759, 760 (5th Cir. 1935) (applying federal common law in the pre-*Erie* era); *Bu-Vi-Bar Petroleum Corp. v. Krow*, 40 F.2d 488, 490 (10th Cir. 1930) (same); *United Press Ass'n v. National Newspaper Ass'n*, 237 F. 547, 553 (8th Cir. 1916) (same). *See also Lee v. Foote*, 481 A.2d 484, 485-86 & nn. 3, 6 (D.C. Ct. App. 1984) (collecting state court decisions from numerous jurisdictions and holding that "[w]hen an express contract has been repudiated or materially breached by the defendant, restitution for the value of the non-breaching party's performance is available as an alternative to an action for damages on the contract").

only for loss that would not have occurred but for the breach." *Id.* § 347 cmt. e.

Two corollary principles confirm the irrelevance of causation to a claim for restitution. First, courts have long recognized that the requirement that a breach-of-contract plaintiff suing for traditional expectation damages show that he is "ready, willing, and able" to perform has no application in restitution. As one court put it, although in a suit for expectation damages a plaintiff "must tender and prove his own readiness, willingness, and ability to perform," a party seeking restitution need not make such a showing; rather, in an "action to rescind and recover payments made on account of the purchase price *it is enough to show a breach by the seller*." *Weintraub v. Rungmar Realty Corp.*, 231 N.Y.S.2d 241, 244 (Sup. Ct. 1962) (emphasis added); *accord* 4 Corbin, *supra*, § 978, at 928 ("If the plaintiff could not have performed in any case, he will not be given damages for the defendant's failure to perform . . . . The rule is not quite the same with respect to the right to restitution of money paid or of the value of other benefits under the contract.").

Second, the availability of restitution in "losing contract" situations likewise demonstrates the irrelevance of causation to claims for restitution. The *Restatement (Second) of Contracts* is illustrative:

> A contracts to sell a tract of land to B for $100,000. After B has made a part payment of $20,000, A wrongfully refuses to transfer title. B can recover the $20,000 in restitution. *The result is the same even if the market price of the land is only $70,000, so that performance would have been disadvantageous to B.*

Restatement (Second) of Contracts § 373 illus. 1 (1981) (emphasis added). Indeed, the Federal Circuit's own decision in *Stone Forest*, 973 F.2d at 1553, recognized this principle in awarding restitution of monies paid to the Government upon its repudiation of a timber contract, even though the lower court had found that the plaintiff had not sought "traditional breach of contract damages" because "it could prove none," *Stone Forest Indus., Inc. v. United States*, 22 Cl. Ct. 489, 494 & n.7 (1991).

B. The Federal Circuit's Decision That The Repeal Of The OBPA Cured The Government's Material Breach Is Contrary To Uniformly Acknowledged Principles Of Contract Law.

As noted above, p. 6, the OBPA introduced new and unanticipated regulatory hurdles not only for Mobil's first POE for the Manteo area, but also for *every* subsequent permit that Mobil would need to delineate oil and gas resources and ultimately to produce such resources and transport them to shore. Mobil argued in the Federal Circuit that North Carolina's CZMA objection pertained only to the first POE for the area and was based upon a purported lack of environmental studies which could, if necessary, be conducted, thereby clearing the path for later exploration, development, and production. Accordingly, even if the CZMA objection were regarded as the cause of the delay inherent in obtaining approval of the first POE, it would not excuse the material breach caused by the OBPA.

The panel majority rejected Mobil's characterization of the OBPA as a "continuing open-ended prohibition of *any* exploration of the North Carolina OCS and *any* development and production of oil and gas resources in that area," by observing that North Carolina's CZMA objection "resulted in a delay that preceded and extended throughout *the period in*

which the OBPA was effective." App. 13a (emphasis added). This vital underpinning of the Court's decision – that the CZMA, *not* the OBPA, was the exclusive cause of the delay that Mobil encountered – can only be understood as resting upon the premise that the repeal of the OBPA in 1996 during the pendency of North Carolina's CZMA objection (but four years after Mobil filed suit) effectively nullified the anticipatory repudiation that arose with the enactment of the OBPA. This holding of the Federal Circuit, like its reliance on causation generally, defies settled law.

It is, of course, true that "[t]he effect of a statement as constituting a repudiation … is nullified by a retraction of the statement …." *Restatement (Second) of Contracts* § 256 (1981). However, a retraction is effective only "if notification … comes to the attention of the injured party before he materially changes his position in reliance on the repudiation or indicates to the other party that he considers the repudiation to be final." *Id.* Significantly, "[t]he bringing of a suit by the promisee for the anticipatory breach is one sort of reliance making retraction impossible." 4 Corbin, *supra*, § 980, at 931; 11 Samuel Williston, *A Treatise on the Law of Contracts* § 1335, at 182-83 (Walter H.E. Jaeger, ed., 3d ed. 1968) ("If … the contract has been totally rescinded, or an action has been brought … such withdrawal is ineffectual."); *Restatement (Second) of Contracts* § 256 cmt. c (1981) ("Cancellation of the contract or the commencement of an action claiming damages for total breach would be sufficient [to preclude retraction].").

Federal courts and state courts agree that by filing suit an injured party cuts off a breaching party's right to retract its anticipatory repudiation. *See, e.g., United States v. Seacoast Gas Co.*, 204 F.2d 709, 711 (5th Cir. 1953) ("All that is required to close the door to repentance is definite action indicating that the anticipatory breach has been accepted as final, and this requisite can be supplied . . . by the filing of a

suit . . . ."); *Lake Erie Distributors, Inc. v. Martlet Importing Co.*, 634 N.Y.S.2d 599, 601 (App. Div. 1995) ("The commencement by plaintiff of its lawsuit was an objective expression of plaintiff's intent to treat [defendant's] repudiation as a final breach .... Therefore, [defendant's] attempted retraction after the lawsuit was commenced was ineffective.").

Congress passed the OBPA – and thereby anticipatorily repudiated Mobil's 1981 OCS lease agreements – in August 1990. Mobil brought suit on October 28, 1992. The OBPA was repealed on April 26, 1996. *See supra* p. 8 & n. 6. That action – four years after Mobil filed suit and a month after the Court of Federal Claims' opinion – was far too late to "cure" the anticipatory repudiation that occurred when the OBPA was enacted.

II. THE FEDERAL CIRCUIT'S DECISION SQUARELY CONFLICTS WITH A RECENT DECISION OF THE NINTH CIRCUIT

In view of the implications of erroneous decisions for the integrity and stability of OCS leases, this Court has granted certiorari, even without a circuit conflict, to correct misconstruction of the OCSLA as it bears upon the financial arrangements for OCS leases, *see Watt v. Energy Action Educ. Found.*, 454 U.S. 151 (1981), and misapplication of the CZMA to OCS leases, *see Secretary of the Interior v. California*, 464 U.S. 312 (198.). The Federal Circuit's decision below presents an *a fortiori* case for exercise of this Court's certiorari jurisdiction because, in addition to the implications of the panel's decision for OCS leasing – *see* Part III below – the decision squarely conflicts with *Far West Federal Bank, S.B. v. OTS*, 119 F.3d 1358 (9th Cir. 1997).

The facts underlying *Far West* are similar in many respects to those underlying *Winstar*, 518 U.S. 839. In

response to a request by the Federal Home Loan Bank Board, a group of investors agreed to recapitalize a failing thrift based on certain regulatory forbearances set forth in an agreement with the Board. Congress later enacted the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (1989), which mandated regulatory action inconsistent with that agreement. The investors sued, seeking rescission of the agreement and restitution, which the district court eventually granted. *See Far West Federal Bank, S.B. v. OTS*, 787 F. Supp. 952 (D. Ore. 1992).

In urging reversal on appeal, the Government argued that FIRREA had not caused the investors any economic harm because a district court injunction had "effectively shieided" them from "whatever adverse impact [they] might otherwise have suffered from FIRREA." *Far West*, 119 F.3d at 1365. The Ninth Circuit affirmed the district court, declaring that the Government's argument that FIRREA had not actually caused Far West's losses "misses the point." *Id.*

> At the moment OTS announced its intention to impose FIRREA regulations on Far West, the Government repudiated the Conversion Agreement. Following repudiation, the Investors had the *absolute right* to cease their own performance and to obtain rescission and restitution.

Id. (emphasis added). The Ninth Circuit then made crystal clear that an injured party seeking restitution is not required to demonstrate that the breaching party's repudiation actually caused its losses: "FDIC's argument implies that the Investors would have to prove that they suffered consequential damages (*e.g.*, loss of their investment) in

order to sue for breach. There is simply no basis in contract law for this proposition." *Id.*

In holding that an injured party has an "absolute right" – irrespective of proof of causation – to obtain rescission and restitution upon an anticipatory repudiation, the Ninth Circuit in *Far West* followed time-honored contract law principles, which, as shown in Part I, have been expressed and affirmed throughout the years by this Court, other federal and state courts, the *Restatements*, and prominent contract law scholars. The Federal Circuit's decision conflicts not only with *Far West*, but also with the settled law that underlies the Ninth Circuit's holding.

III. THE FEDERAL CIRCUIT'S DECISION WILL HAVE PROFOUND CONSEQUENCES FOR OCS LEASING, AS WELL AS OTHER FEDERAL CONTRACTING, LEASING, AND LICENSING PROGRAMS

The significance of the issues decided by the panel majority transcends the very substantial sums that are directly at issue in this case. The Court of Federal Claims, whose decisions are reviewed by the Federal Circuit, is generally the only court in which parties like Mobil, who have paid significant monies to the Federal Government, can seek restitution when confronted with a material breach of contract by the Government.[13] The decision below, if not corrected by this Court, effectively deprives private parties of that remedy whenever the Government can point to some

[13] Cases involving less than $10,000 may be brought in district court pursuant to 28 U.S.C. § 1346(a)(2). Moreover, as *Far West* demonstrates, cases may be brought in district court against agencies whose organic acts contain "sue and be sued" clauses. 119 F.3d at 1362 n.1.

other reason why the party aggrieved by a material breach might not have enjoyed the benefits of its contract.

Most directly, the panel's decision threatens the integrity of thousands of OCS leases – involving billions of dollars in private investment – issued by the United States under the OCSLA. At year-end 1997, there were 7359 OCS leases outstanding. *See* Mineral Revenues 1997: Report on Receipts, DOI Minerals Management Service (Nov. 1998). During the last three fiscal years alone, companies like Mobil paid the Government more than $3.6 billion in bonus payments for new OCS leases. *See* U.S. Department of the Interior Minerals Management Service, Mineral Revenues 1998 (Preliminary), at 51 tbl.20 (1999) (visited July 28, 1999) <http://www.rmp.mms.gov/library/statroom/MR.htm>.

The effects of the Federal Circuit's decision extend beyond the OCS leasing program to every Government contracting, leasing, and licensing program administered under a statutory scheme requiring investors to pay large front-end bonuses or undertake large investments. Among the most noteworthy –

- *The Communications Act of 1934*, 47 U.S.C. § 309(j), permits the FCC to auction licenses for segments of the electromagnetic spectrum. Since 1993, the Government has collected an estimated $11 billion in revenues from successful bids.[14]

- *The Federal Coal Leasing Amendments Act of 1976*, 30 U.S.C. 201(a)(1), authorizes the Government to lease land to private parties for

[14] *See* Federal Communications Commission, Wireless Telecommunications Bureau (visited July 28, 1999) <http://www.fcc.gov/wtb/auctions.html>.

coal mining. In fiscal year 1998 alone, the Government collected more than $140 million in up-front bonus payments.[15]

- *The Oil and Gas Prospecting Act*, 30 U.S.C. §§ 223, 226(b), permits the Government to lease its land for oil and gas exploration. During fiscal years 1996, 1997, and 1998, bidders paid nearly $168 million to the Government in advance bonus payments.[16]

- *The Mineral Lands Leasing Act (Sodium Provisions)*, 30 U.S.C. §§ 261, 262, allows the Government to lease lands for the exploration of various forms of sodium. During fiscal years 1996, 1997, and 1998, the Government collected more than $14 million in bonus payments from lessees.[17]

- *The National Forest Management Act*, 16 U.S.C. § 472a, permits the Government to grant contracts for the sale and harvesting of timber on federal lands. Successful contractors are required to pay substantial sums of money – often many hundreds of thousands of dollars – in advance.

The decision below gives the Federal Government an opportunity to argue, whenever new statutory or regulatory restrictions are imposed upon existing contracts, leases, or

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15 *See* U.S. Department of the Interior Bureau of Land Management, Public Land Statistics 1998, at 108-11 tbl.3-18 (1999).

16 *See id.* at 94 tbl.3-13 (1999).

17 *See id.* at 113-14 tbl.3-19 (1999).

licenses, that restitution is not available. Many, if not most, Government contracts are subject to a complex web of regulations – mineral leases, for instance, are subject, to the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370, the Endangered Species Act, 16 U.S.C. §§ 1531-1544, and various other environmental and land-use statutes. In future cases, taking its cue from the decision below, the Government will be free to restructure or even repudiate its agreements and offer the post hoc rationalization that some other statute or regulation – the equivalent of the CZMA in this case – served as an independent and supervening cause of the innocent parties' losses.

The animating "theme" of this Court's decision in *Winstar* is that, when the Federal Government enters into contractual arrangements with private parties, it must play by the same rules as everyone else. *See, e.g.*, *Winstar*, 518 U.S. at 895 ("[A]llowing the Government to avoid contractual liability by passing any 'regulatory statute' would flout the general principle that, '[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.'" (quoting *Lynch v. United States*, 292 U.S. 571, 579 (1934))); 518 U.S. at 895 n.39 ("The United States does business on business terms." (quoting *Clearfield Trust Co. v. United States*, 318 U.S. 363, 369 (1943))); 518 U.S. at 896 ("[T]he Government is to be treated like other contractors.").

By permitting the Government in this case to enact legislation which materially breached its lease agreements with Mobil and keep the $78 million Mobil had paid for them, the Federal Circuit has sanctioned a major departure from *Winstar*.

CONCLUSION

For the reasons stated above, the petition should be granted.

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UNITED STATES COURT OF APPEALS,
FEDERAL CIRCUIT.

MARATHON OIL COMPANY AND MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,

Plaintiffs-Appellees,

v.

UNITED STATES, Defendant-Appellant.

No. 97-5146.

May 13, 1999.

Before NEWMAN, PLAGER, and RADER, Circuit Judges.

Opinion for the court filed by Circuit Judge PLAGER. Dissenting opinion filed by Circuit Judge NEWMAN.

Plager, Circuit Judge.

This is a contract dispute between a lessor, the United States ("Government"), and lessees, Marathon Oil and Mobil Oil (collectively "Marathon"), involving Outer Continental Shelf ("OCS") oil and gas leases on submerged lands off the coast of North Carolina. The dispute centers over the denial by the Government of the permits necessary before Marathon could engage in oil exploration, and the effect of legislation enacted subsequent to the parties entering the leases. The legislation imposed a temporary moratorium on oil exploration in the lease areas. Marathon initially pursued administrative appeals of its permit denials, then sued in the Court of Federal Claims to recover its lease rental and

up-front cash bonus payments. Marathon claimed that the legislation effected a material breach of the OCS leases. The Government denied the breach and presented a number of defenses. The Court of Federal Claims agreed with Marathon, finding that the Government had materially breached the leases. *See Conoco Inc. v. United States*, 35 Fed. Cl. 309 (1996). In a subsequent proceeding, the court awarded both Marathon and Mobil restitution of their up-front payments, in total over $156 million. *See Marathon Oil Co. & Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, No. 92-331C (Fed.Cl. July 24, 1997). Because the moratorium legislation was not the operative cause of Marathon's failure to obtain the required permits, the judgment of the Court of Federal Claims is reversed.

BACKGROUND

This case has a rather complicated legal and factual background. We summarize the salient law and the history of the case; for the full details *See* the exhaustive Court of Federal Claims opinion in *Conoco Inc. v. United States*, 35 Fed. Cl. 309, 314-19 (1996).

A.

The Outer Continental Shelf Lands Act of 1953 ("OCSLA"), 67 Stat. 462, as amended, 92 Stat. 629 (codified at 43 U.S.C. §§ 1331-1343 (1970)), establishes federal jurisdiction over submerged lands on the continental shelf beyond three miles from the coastline. (Submerged lands within the three mile limit fall within the jurisdiction of the individual coastal states.) *See* 43 U.S.C. §§ 1301, 1331(a) (1994).

Pursuant to the OCSLA, the Secretary of the Interior ("the Secretary") is authorized to grant oil and gas leases on OCS lands through a competitive bidding process. *See id.* § 1337(a) (1994). OCS leases run initially for five to ten years, but may be extended for as long as drilling or production is

taking place on the leased tract. Lease terms grant lessees the "exclusive right and privilege to drill for, develop, and produce oil and gas resources," in exchange for an up-front cash bonus and periodic lease payments.

Obtaining a lease is one thing; obtaining the necessary permits to first explore and then produce is another. The OCSLA statutory scheme calls for specific submission and approval requirements for each step in the process of exploration, development, and production of OCS-derived oil or gas. In addition to approvals from the Department of the Interior ("DOI"), approvals may also be required from various state and federal agencies.

The first step in the process, exploration, begins with submittal by the lessee to the Secretary of a plan of exploration ("POE"). *See* 43 U.S.C. § 1340(b), (c)(1). The plan must comply with all provisions of the statute, the extensive regulations prescribed by the statute, and the terms of the lease. When the plan with such modifications as may be necessary are found by the Secretary to so comply, the Secretary must approve the POE within thirty days unless the Secretary determines that the proposed activity under the lease would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits, to the national security or defense, or the marine, coastal, or human environment, and the proposed activity cannot be modified to avoid such harm. *See id.* § 1340(c)(1) (1994) (incorporating the provisions of § 1334(a)(2)(A)(i)). The Secretary is authorized to suspend operations under the lease temporarily upon finding that a similar threat exists subsequently. *See id.* § 1334(a)(1)(B).

Once the POE is approved, the DOI may consider issuance of the permits and approvals that are required before actual drilling takes place. In applying for a required federal license or permit, an applicant whose activities will affect land or water uses in the coastal zone of a state - such as

North Carolina - with a federally approved coastal zone management program must provide to the federal licensing or permitting agency a certificate that its proposed activities comply with the state's approved program. *See* 16 U.S.C. § 1456(c)(2) (1994). The Coastal Zone Management Act ("CZMA") requires state concurrence with an applicant's consistency certification. *See id.* § 1456(c)(3)(B)(i). If the state objects, an applicant may appeal that determination to the Secretary of Commerce. *See id.* § 1456(c)(3)(B)(i)- (iii). The Secretary of Commerce has authority to override the state's objection by finding that the POE is consistent with the CZMA objectives or is otherwise necessary for national security interests. *See id.*

In addition to the requirement for an approved POE, the implementation of which requires state concurrence (or override) under the CZMA, if the POE includes discharge of pollutants into the ocean a National Pollutant Discharge Elimination System ("NPDES") permit must be obtained from the Environmental Protection Agency ("EPA"). *See* Federal Water Pollution Control Act, 33 U.S.C. §§ 1311(a), 1342(a) (1994). Again, state concurrence under the CZMA is required before an NPDES permit may be granted. *See* 16 U.S.C. § 1456(c)(3)(A).

B.

The leases at issue were acquired in 1981 when Marathon Oil Company, Mobil Oil Exploration and Producing Southeast Inc., and Amerada Hess Corporation each bought 1/3 undivided interests in five North Carolina OCS leases. The three corporations each paid the Government more than $78 million in front-end cash bonuses and subsequently paid the Government approximately $264,000 in annual rentals during the ten year primary term.

The first planned activity involving the leased land resulted from the combination of Marathon and other North

Carolina OCS lessees into a single entity known as the Manteo Unit. The Manteo Unit proposed drilling one exploratory well about forty-five miles east of Cape Hatteras. In July, 1989, after initial objections to the proposed POE by the State of North Carolina, the state, the DOI, and the Manteo Unit operator entered into a Memorandum of Understanding ("MOU") calling for a special environmental review before the DOI would act on the Manteo Unit POE.

The Manteo Unit also needed to obtain a NPDES permit from the EPA for the POE. The permit was required because the POE included planned discharge of wastes into the ocean. *See* 33 U.S.C. §§ 1311(a), 1342(a).

The environmental review required by the MOU issued in June, 1990. Following review of the three-volume report, the DOI determined that the POE would not result in any significant environmental impacts and was deemed as far as the DOI was concerned, to be "approvable in all respects." However, on July 17, 1990, North Carolina objected to CZMA certification of Mobil's NPDES permit application.

Before any further action was taken, and before any permit requests were acted upon, Congress, in August, 1990, enacted the Outer Banks Protection Act ("OBPA") in direct response to environmental concerns raised by North Carolina. The OBPA essentially placed a temporary moratorium on exploration or development of the North Carolina OCS, and created an Environmental Sciences Review Panel ("ESRP") to study the impact of any proposed OCS development, *see* OBPA § 6003(c)(3)(A).

Specifically, the OBPA prohibited DOI from approving any POEs, PODs, or permits to drill on the North Carolina OCS until the later of October 1, 1991, or forty-five days of continuous congressional session following DOI's receipt of an ESRP report and submission of a certificate by the Secretary reporting that he had sufficient information to carry

out his responsibilities under the OCSLA, *see id.* § 6003(c)(3)(A)(ii)(I). In light of the enactment of the OBPA, the Mineral Management Service ("MMS") of the DOI suspended all leases offshore of North Carolina as of August 18, 1990, at the same time lifting the obligation to pay rentals on the leases.

In spite of the enactment of the OBPA, on August 20, 1990, Mobil, on behalf of the Manteo Unit, submitted its final plan of exploration to drill an exploratory well. On November 19, 1990, North Carolina officially objected to the Manteo Unit's certification that its exploration plan would comply with the CZMA. Unless overridden, North Carolina's objections to Mobil's CZMA certifications of the POE and the NPDES applications effectively barred the requested NPDES permit and any implementation of the POE.

The Manteo Unit partners pursued appeals of North Carolina's CZMA objections to the Secretary of Commerce. On September 2, 1994, Commerce found the proposed POE and proposed discharges of drilling wastes to be "neither consistent with the objectives of the CZMA nor necessary in the interests of national security," and declined to override North Carolina's objections.

In January, 1992, the ESRP issued a final report on the Manteo Unit POE to the Secretary of the Interior. The Secretary then issued a report to Congress in April, 1992, certifying that he possessed sufficient information to perform his obligations under the OCSLA for approval of the single-well POE. By the terms of the OPBA, the temporary moratorium imposed on secretarial action by the OPBA lifted after the next forty-five days of congressional session.

However, the Secretary on his own initiative then deferred approval of the POE until the MMS completed two ESRP-recommended studies. Following the Secretary's April 1992 certification, which MMS treated as lifting the OBPA's

bar on exploration of the Manteo Unit, Mobil requested additional suspensions of the Manteo Unit leases until both the additional ESRP studies were completed and Mobil's appeals of North Carolina's 1990 CZMA objections were decided.

MMS lifted the North Carolina OCS lease suspension in November, 1994, after the MMS released the two ESRP-recommended studies and the Secretary of Commerce had declined to override North Carolina's objections to the Manteo Unit POE and NPDES permit applications. Congress repealed the OBPA in 1996. *See* Pub.L. No. 104-134 Title I, Department of the Interior § 109, 110 Stat. 1321-177 (1996).

C.

In October 1992, Mobil and Marathon, together with a number of other OCS oil and gas lessees of the Government, intervened in a breach of contract action before the Court of Federal Claims between the United States and Conoco over OCS leases off the coasts of Alaska, Florida, and North Carolina. Eventually, all the OCS lessees reached compromise settlements with the Government, allowing entry of final judgments and cancellation of their leases. Marathon and Mobil, however, reserved the right to and maintained all claims with respect to the OBPA's effect on the OCS leases off the coast of North Carolina.

Thereafter, on cross-motions for summary judgment, the Court of Federal Claims held that the Government's "failure [to carry out its contractual obligations], under the restrictions adopted pursuant to the OBPA, was a material breach of the leases," entitling Mobil and Marathon to damages. *Conoco Inc. v. United States*, 35 Fed. Cl. 309, 331 (1996). The court reached its conclusion by finding that the OCS lease terms were not subject to future or subsequent statutes and their related regulations, including something as unforeseeable as OBPA. *See id.* at 323-24. Within the lease

terms, the court found that the Government had a duty to consider lessees' POEs in a timely and fair manner. *See id.* at 328. The Court of Federal Claims concluded that "compliance with the OBPA compelled governmental breach by non-performance accompanied by an anticipatory repudiation thereby giving rise to 'total breach.' " *Id.* at 327. In addition, the court determined that the Secretary of the Interior's powers under the OSCLA did not extend to the suspension of the leases for OBPA compliance. *See id.* at 329-30.

The court reviewed at length this court's opinion in Winstar Corp. v. United States, 64 F.3d 1531 (Fed.Cir.1995), *aff'd*, 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996), and its application to the circumstances under which the United States may be liable for breach despite the sovereign acts doctrine. *See id.* at 331-34. Applying the four *Winstar* factors, the court found that the United States was liable for breach stemming from the OBPA because the Act violated the objective intent of the parties to the OSC leases by prohibiting exploration and development, and because the parties' mutual assent as expressed in the leases cannot be subverted by a governmental change in environmental regulatory policies. *See id.* at 333-34.

The Court of Federal Claims rejected the government's defense of immunity under the sovereign acts doctrine. The court found that although the OBPA "may have been the result of developing environmental concerns, it was not an act of public, general applicability." *Conoco*, 35 Fed. Cl. at 336. Instead, the court determined that the OBPA was specifically targeted at the plaintiffs and prevented them from exercising their lease rights - exploration of the OCS offshore of North Carolina. *Id.* Because the OBPA "does not constitute a sovereign act," the court concluded that United States was liable for breach of contract. *Id.* In addition, the court determined that the related theory of unmistakability

was inapplicable since it "stands or falls with the sovereign acts doctrine." *Id.* at 335.

Subsequently, the Court of Federal Claims held a hearing to determine if restitution of lessees' cash bonuses and rentals should be offset by the amount of benefits received by lessees before enactment of the OBPA. The court concluded that the Government had failed to identify a legally cognizable benefit and issued judgment in favor of lessees for the $156 million cash bonuses paid, but found that lessees were not entitled to a return of their annual lease rental payments. The Government appeals from the judgment of liability for material breach of contract and from the trial court's restitutionary award.

DISCUSSION

If there are no material facts in dispute precluding summary judgment - and neither party argues there are - our task is to determine whether the judgment granted is correct as a matter of law. *See, e.g., Confederated Tribes of Colville Reservation v. United States*, 964 F.2d 1102, 1107 (Fed.Cir.1992).

A.

The first question raised is whether the OCS leases are by their terms subject to the OBPA. If the leases as written are expressly subject to future legislation such as the OBPA, then the Government's enactment and enforcement of that act cannot be a breach of the OCS leases. Section 1 of the OCS lease provides that the lease is issued pursuant to the OCSLA and is:

> [S]ubject to the [OCS Lands] Act; Sections 302 and 303 of the Department of Energy Organization Act ...; all regulations issued pursuant to such statutes and in existence upon the effective date of this lease; all

> regulations issued pursuant to such statutes in the future which provide for the prevention of waste and the conservation of the natural resources of the Outer Continental Shelf, ...; and all other applicable statutes and regulations.

(Emphasis added.) The Court of Federal Claims interpreted the phrase "all other applicable statutes and regulations" as not including subsequent legislation such as the OBPA. *See Conoco*, 35 Fed. Cl. at 322-24. We agree. To read the original contract between the parties as incorporating all future actions, whether by statute or regulation, by one of the parties would raise serious questions about illusory contracts, and perhaps questions of due process and other constitutional concerns. Before interpreting a contract in that manner, there would have to be a much clearer statement of the parties' intent to so contract. In any event, because the outcome of the case does not turn on this issue, we need not further dwell upon it.

We turn next to the question of the parties' obligations under the OCS lease. Lessees paid a substantial up-front cash bonus and annual rents in exchange for the "exclusive right and privilege to drill for, develop, and produce oil and gas resources." That right, however, was expressly conditioned on compliance with a complex fabric of statutory and regulatory provisions, which included involvement by both federal and state agencies. The lessees were both knowledgeable and sophisticated purchasers, and entered into these leases with their legal eyes wide open.

Section 10 of the lease, entitled "Performance," specifically states that lessees "shall comply with all regulations and orders relating to exploration, development, and production." Pursuant to the OCSLA and relevant regulations, lessees must obtain federal and state approvals and certifications before they may explore or develop the

leased areas. *See* 43 U.S.C. § 1340. Accordingly, under the OCS lease, lessees' rights to exploration, development, and production were conditioned upon obtaining the necessary federal and state approvals.

As explained earlier, the regulatory scheme requires that lessees submit a POE for the Secretary of Interior's approval. *See id.* § 1340(c)(1). If the Secretary approves the POE, he may grant an exploratory license or permit if there is state concurrence under the CZMA; however, the statute is clear that:

> The Secretary shall not grant any license or permit for any activity described in detail in an exploration plan and affecting any land use or water use in the coastal zone of a State with a coastal zone management program ... unless the State concurs or is conclusively presumed to concur with the consistency certification accompanying such plan ... or the Secretary of Commerce makes ... [such a] finding....

43 U.S.C. § 1340(c)(2) (1994).

In this case, North Carolina objected from the beginning to the Manteo Unit's proposed exploration as being inconsistent with its coastal zone program under the CZMA. This led to the MOU between the Manteo Unit, the DOI, and the State of North Carolina in 1989. Pursuant to the MOU, MMS issued an environmental report in June, 1990. Although the DOI then concluded that the Manteo Unit's POE "complied in all respects with [DOI] regulations" and "[t]he Plan, together with its supporting information, [was] deemed to be approvable in all respects," this did not dispose of North Carolina's objections. Furthermore, North Carolina registered its objections to Mobil's and Marathon's NPDES certification of consistency in July 1990, and restated its

objections to their POE's certification of consistency in November 1990; North Carolina maintained both of these objections throughout the time that the moratorium imposed by the OBPA was effective.

Whatever restraints on secretarial actions were imposed by the OBPA essentially had no effect upon these OCS leases because exploration could not proceed without North Carolina's concurrence in the POE's CZMA consistency certification or the override provided by law. *Cf. Secretary of the Interior v. California*, 464 U.S. 312, 341, 104 S.Ct. 656, 78 L.Ed.2d 496 (1984) (observing that states with approved CZMA plans "retain considerable authority to veto inconsistent exploration or development and production plans"). Thus, North Carolina's legally valid objection to the consistency certification left unfulfilled the requirement that the lessees demonstrate compliance with applicable statutes and regulations, compliance with which was a prerequisite to obtaining the necessary permits and licenses.

Lessees have not established that their inability to obtain secretarial approval of the POE and to undertake exploratory activity was caused by the moratorium rather than by the fact that they were unable to provide the necessary state concurrence to their certification of CZMA compliance. And even if the Secretary had felt constrained in acting on the application by the provisions of the OBPA, the law is clear that, had he been free to act, he could not have issued any permits for exploration so long as North Carolina's objections remained in force. *See Sun Oil Co. v. United States*, 215 Ct.Cl. 716, 572 F.2d 786, 804-06 (Ct.Cl.1978) (finding that government delay in permit approval was irrelevant because it was not the primary cause of delay).

Congress specifically conditioned offshore oil exploration on the principle that environmental factors could not be ignored, and specifically made the activity subject to express compliance with extant coastal zone management

programs. Under the circumstances of this case, to treat Marathon's failure to obtain the necessary approvals and permits for exploratory activity as a breach of contract by the Government would be to eviscerate these salutary protections of the nation's fragile coastal lands and waters. The trial court viewed the moratorium imposed by the OBPA as having indefinite duration and unavoidable consequences. In fact, appellees' failure to overcome North Carolina's objections resulted in a delay that preceded and extended throughout the period in which the OBPA was effective.

Marathon argues that this case is not just about a delay in the approval of the POE for the North Carolina OCS leases. Appellees characterize the OBPA as constituting a "continuing, open-ended prohibition of any exploration of the North Carolina OCS and any development and production of oil and gas resources in that area." For the reasons noted, that is not a correct description of the OBPA. Even if it were, the argument ignores the fact that the lessees had failed to submit a POE that carried with it state concurrence with the CZMA consistency certification. The record shows that the state's objection to appellees' NPDES permit application was based on "Mobil's failure to provide data and information necessary to allow the State to conduct a proper consistency review of the proposal on its merits." Likewise, North Carolina's objection to the Manteo Unit POE CZMA consistency certification was due to the inadequacy of the information provided by Mobil.

Appellees argue further that North Carolina's CZMA consistency objection was not independent of the Government's actions because the Secretary of Commerce rejected lessees' request to override North Carolina's CZMA objections based "in large part on the OBPA and on the findings of the OBPA Panel." It appears from this that appellees' real complaint is that the Secretary of Commerce refused to override North Carolina's CZMA objections; this

issue is not before us on appeal so we do not address it further.[1]

We have considered appellees' remaining arguments regarding contract breach, and find them unpersuasive.

B.

Appellees argue that even if their leases are subject to state objection over the CZMA consistency certification, the OCSLA provides for cancellation of the leases and restitution in such a situation. In support of their contention, Marathon claims that 43 U.S.C. § 1337(b)(4) "shows that Congress intended lessees to receive compensation for their leases if the Government in any way precluded them from exploration." Section 1337(b)(4) entitles the lessee to "explore, develop, and produce the oil and gas contained within the lease area, conditioned upon due diligence requirements and the approval of the development and production plan required by this subchapter." We fail to see how this language shows any such intent. The OCSLA does give the Secretary authority to cancel the leases under certain circumstances, entitling a lessee to compensation. *See* 43 U.S.C. §§ 1334(a)(2), (c)-(d); 1340(c)(1); 1351(h)(1)- (2). Those sections are not applicable to the case before us, and Marathon does not claim that they are.

Nor is there any other basis under the lease for the lessees to claim restitution of some or all of their money. The OCS lease grants lessees the "exclusive right and privilege to drill for, develop, and produce oil and gas resources," in exchange for an up-front cash bonus and periodic lease payments. This right, however, is contingent upon lessees' agreement to

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[1] We note that appellees have filed an action challenging the Secretary of Commerce's decision. *See Mobil Oil Exploration v. Brown*, 920 F.Supp. 1 (D.D.C.1996).

"comply with all regulations and orders relating to exploration," including the need for federal and state approvals. Therefore, "[u]nder the plain language of OCSLA, the purchase of a lease entails no right to proceed with full exploration, development, or production ...; the lessee acquires only a priority in submitting plans to conduct those activities ... [upon disapproval] no further exploration or development is permitted." *Secretary of the Interior v. California*, 464 U.S. at 339.

The Supreme Court has recognized that only the major oil companies can "risk paying a large [up-front] cash bonus to lease a tract of unknown value." *See Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 154, 102 S.Ct. 205, 70 L.Ed.2d 309 (1981). In this case, Mobil and Marathon bid and paid the cash bonuses on the expectation that the leased lands contained substantial oil reserves and could be made productive. *See* James C. Cox et al., *OCS Leasing and Auctions: Incentives and the Performance of Alternative Bidding Institutions*, 2 SUP.CT. ECON. REV. 43, 51-52, 54 (1983) (explaining that a bidding process like the OCS lease system which produces a variable, high cash bonus combined with a fixed, low royalty rate places most of the development risk upon the winning bidder rather than on the Government). We see no principled distinction between a lessee whose hopes for large rewards from such a lease are frustrated by a failure to obtain the necessary permits for exploration, and those of a lessee whose hopes are drowned by impossible weather, equipment failures, financial setbacks, or any number of other circumstances beyond the lessee's control. In either case, the lessee contracted for the exclusive opportunity to explore in a certain area; the inability of a lessee to explore, if not attributable to the Government, does not create an entitlement to any refund of the consideration paid to obtain the lease. *See* THOMAS J. TOUHEY ET AL., 4

GOVERNMENT CONTRACTS § 28.40[2], at 28- 111 (1998); *cf. Sun Oil*, 572 F.2d at 806.

Since we find no basis for a restitutionary remedy, we need not address the parties' contentions with respect to the manner in which the Court of Federal Claims calculated the amount of restitution.

Marathon and amici make much of the economic consequences of an adverse decision to the future of oil exploration on the OCS. Their fears are overstated, or at the least misplaced. The narrow issue in this case is the impact of the OBPA on the particular leases at issue. We conclude that the lease agreement in this case has not been breached by either party. Rather, Marathon has been unable to obtain the necessary Government approvals that would allow it to go forward with exploration of the lease site, a problem for Marathon that arose in 1989, before the OBPA was enacted, and continued after the OBPA was repealed. This is not a case of a supervening act that makes performance impossible, but simply a playing out of the express provisions of the agreement.

The OBPA was not the cause of Marathon's inability to obtain issuance of the required permits and approvals for its proposed oil exploration, and there is no evidence of a breach of contract by the United States. There is no other basis on which Marathon can claim a return of its contract payments.

CONCLUSION

The judgment of the Court of Federal Claims in Marathon's favor is

REVERSED.

NEWMAN, Circuit Judge, dissenting.

This is a contract case. The Court of Federal Claims, determining that the contract between Marathon[2] and the United States was made impossible of performance by governmental action, held that Marathon is entitled to recover what it paid the government for the now-barred contract rights, $156,000,000 paid up-front.

The legal issue is not complex. When one party to a contract prevents the other party from achieving the benefit for which it paid, the party who prevents the performance can not retain the consideration it accepted for the performance. It was not a "failure to obtain the required permits" through fault of Marathon that barred the exploration of the Manteo tract; it was the change of government policy after the exploration rights had been sold and paid for. Marathon does not challenge the government's change of policy; nor does Marathon seek damages, or specific performance, or other interesting things. Marathon just wants its money back.

The Court of Federal Claims, applying simple contract principles, ordered the government to return this payment. My colleagues now authorize the government to keep it. That is not the law, and it is not responsible government dealing. I must, respectfully, dissent.

DISCUSSION

Marathon and the government entered into a standard exploration and development contract under the Outer Continental Shelf Lands Act, for the Manteo and an adjacent tract of the Outer Banks, 48 miles offshore North Carolina. In accordance with the Act, 43 U.S.C. '1337(b)(4) "entitle(s) the

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[2] I use "Marathon" to include both appellees, Marathon and Mobil.

lessee to explore" its tracts. That entitlement was negated when the government refused to issue the requisite permits, barring all exploration. This refusal was at the behest of North Carolina, who obtained a congressional moratorium on exploration of the Outer Banks. When this moratorium ended in 1996 the federal government refused to override North Carolina's objection, although it had that right by statute. This eliminated Marathon's exploration right. While it was the objection of North Carolina that led to the prohibition of exploration of the Outer Banks, first by state refusal to certify the exploration, then by enactment of the Outer Banks Protection Act, and then by the refusal of the Secretary of Commerce to override the state's objection, this does not justify the federal government's confiscation of Marathon's payment for a contract entered into before any such objection arose.

The panel majority, legitimizing the government's action, defines the issue as "the narrow issue of the impact of the Outer Banks Protection Act." That is inaccurate, for Marathon did not through this Act acquire a risk of forfeiture of its payment for exploration. Indeed, the panel majority raises no issues of "sovereign action" or other discarded theory, and simply rules that Marathon bore the risk that there would arise intractable state objections in which the federal government would acquiesce. However, the exploration of the outer continental shelf was and is within the control of the federal government. When the government tardily decided to withdraw exploration rights for the Outer Banks, contract law and fair dealing require that Marathon's payment for the right of exploration be returned. The issue is not whether Marathon can bear the risks of exploration, *see* maj. op. at 15, but whether the government shall deal fairly and legally with its contracting partners.

The panel majority appears to misunderstand Marathon's argument. For example, Marathon does not argue that every

exploration plan it might have submitted must be approved (although the Department of the Interior described Marathon's Manteo tract plan as "the most comprehensive exploration plan ever submitted to the agency"). As the Court of Federal claims recognized, the governmental obligation was to "timely and fairly consider" exploration plans that were properly submitted. *Conoco Inc. v. United States*, 35 Fed. Cl. 309, 327 (Fed.Cl.1996). The Outer Continental Shelf Lands Act set thirty days for this consideration. However, the Outer Banks Protection Act precluded action on Marathon's exploration plan during the OCSLA time frame.

The Outer Banks Protection Act was enacted after the contract with Marathon was made and paid for. These subsequent events were all outside of the control of Marathon. It is the government that prohibited performance of the contract. The common law of rescission and restitution, the statutory remedy of 43 U.S.C. § 1334(a)(2)(C), and precedent, all require remedy for this post-contract negation of the government's promise.

It is hornbook law that when a contract becomes impossible of performance through events outside the control of a party, restitution is an appropriate remedy. *See* 5 CORBIN ON CONTRACTS § 1112 at 549 (1964) ("a party who is excused from performance by supervening impossibility is not privileged to keep something for nothing, and restitution is an available remedy against him"); RESTATEMENT (SECOND) OF CONTRACTS § 272 (discussing forms of relief such as rescission when contract performance becomes impracticable), § 264 (governmental regulation can render performance impracticable and be subject to relief), § 377 (remedy of restitution is appropriate in cases of impracticability and frustration of contractual purpose).

In addition, the Outer Continental Shelf Lands Act provides that the Secretary of the Interior can disapprove an exploration plan based on perceived harm to the

environment, and that when environmental harm or other causes of disapproval can not be avoided by the exploration, the Secretary may cancel the lease, but in such event "the lessee shall be entitled to compensation." 43 U.S.C. § 1334(a)(2)(C). Potential causes of disapproval are listed in s 1334(a)(2)(A)(i), viz., "(i) continued activity pursuant to such lease or permit would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral (in areas leased or not leased), to the national security or defense, or to the marine, coastal, or human environment." Environmental objections were raised by North Carolina. The government has not, however, cancelled Marathon's lease, although it has rendered exploration impossible by refusing the necessary permits, despite the Interior Department's ruling that Marathon's Plan of Exploration and environmental report were "approvable in all respects." Marathon's conceded compliance with the federal environmental criteria raises, at a minimum, issues of fair dealing when state objections are relied on for withdrawal of the federal right without return of the federal consideration.

A wealth of precedent illustrate the remedies of rescission and restitution when performance of a contract is rendered impossible. *E.g.*, Stone Forest Industries v. United States, 973 F.2d 1548 (Fed.Cir.1992) (restitution of sums paid when intervening environmental legislation prevented performance of a timber contract); *Aerojet-General Corp. v. Askew*, 453 F.2d 819, 831 (5th Cir.1971) ("The failure to render a promised performance may not be a breach of contract for the reason that performance has become impossible without fault; but it is nonetheless a failure of consideration discharging the other party from his duty to make the agreed return and giving him a right to the restitution of payments already made or other benefits already conferred.") (quoting 6 CORBIN ON CONTRACTS, § 1255); *E.H. Boly & Son, Inc. v.*

Schneider, 525 F.2d 20, 23-24 (9th Cir.1975) ("Any voluntary affirmative act of a party which renders substantial performance of his contractual duties impossible, or apparently so constitutes a total breach and warrants a suit seeking cancellation and restitution.... When one party repudiates a contract or commits a total breach thereof, the injured party has an election to pursue one of three remedies; he may treat the contract as at an end and sue for restitution, he may sue for damages, or he may sue for specific performance in certain cases.") (citations omitted).

The panel majority, authorizing the United States to keep Marathon's payment, explains that there is "no principled distinction" between payment for a right of exploration that has been performed but failed to find oil or encountered adversity such as weather, and payment for a right of exploration that has not been performed because it was prohibited by the government after it was paid for. According to the panel majority, in either case the government is entitled to retain the payment for the exploration right. This analysis is not supportable by any legal or equitable theory. What Marathon paid for was the right of exploration. Marathon bore the risk that the exploration might fail to find oil or gas, but Marathon did not bear the risk that exploration would be entirely barred, especially by the same party from whom it bought the right.

I do not fault the decision now to bar exploration of the Outer Banks; I fault the refusal to give back what Marathon paid for the right to explore the Outer Banks. Whatever the government's power to avoid its contractual obligations, this does not also entail the right to retain the consideration paid in contract. The Court of Federal Claims correctly analyzed the issues, applied the correct law, and reached a proper and just conclusion. That decision should be affirmed.

**UNITED STATES COURT OF APPEALS,
FEDERAL CIRCUIT**

MARATHON OIL COMPANY AND MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,

Plaintiffs-Appellees,

v.

UNITED STATES, Defendant-Appellant.

No. 97-5146.

Oct. 15, 1998.

Before NEWMAN, PLAGER, and SCHALL, Circuit Judges.

Opinion for the court filed by Circuit Judge PLAGER. Dissenting opinion filed by Circuit Judge NEWMAN.

PLAGER, Circuit Judge.

This is a contract dispute between a lessor, the United States ("Government"), and lessees, Marathon Oil and Mobil Oil (collectively "Marathon"), involving Outer Continental Shelf ("OCS") oil and gas leases on submerged lands off the coast of North Carolina. The dispute centers over the denial by the Government of the permits necessary before Marathon could engage in oil exploration, and the effect of legislation enacted subsequent to the parties entering the leases. The legislation imposed a temporary moratorium on oil exploration in the lease areas. Marathon initially pursued administrative appeals of its permit denials, then sued in the Court of Federal Claims to recover its lease rental and up-front cash bonus payments. Marathon claimed that the

legislation effected a material breach of the OCS leases. The Government denied the breach and presented a number of defenses. The Court of Federal Claims agreed with Marathon, finding that the Government had materially breached the leases. *See Conoco Inc. v. United States*, 35 Fed. Cl. 309 (1996). In a subsequent proceeding, the court awarded both Marathon and Mobil restitution of their up-front payments, in total over $156 million. *See Marathon Oil Co. & Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, No. 92-331C (Fed.Cl. July 24, 1997). Because the moratorium legislation was not the operative cause of Marathon's failure to obtain the required permits, the judgment of the Court of Federal Claims is reversed.

BACKGROUND

This case has a rather complicated legal and factual background. We summarize the salient law and the history of the case; for the full details *See* the exhaustive Court of Federal Claims opinion in *Conoco Inc. v. United States*, 35 Fed. Cl. 309, 314-19 (1996).

A.

The Outer Continental Shelf Lands Act of 1953 ("OCSLA"), 67 Stat. 462, as amended, 92 Stat. 629 (codified at 43 U.S.C. §§ 1331-1343 (1970)), establishes federal jurisdiction over submerged lands on the continental shelf beyond three miles from the coastline. (Submerged lands within the three mile limit fall within the jurisdiction of the individual coastal states.) *See* 43 U.S.C. §§ 1301, 133i(a) (1994).

Pursuant to the OCSLA, the Secretary of the Interior ("the Secretary") is authorized to grant oil and gas leases on OCS lands through a competitive bidding process. *See id.* § 1337(a) (1994). OCS leases run initially for five to ten years, but may be extended for as long as drilling or production is taking place on the leased tract. Lease terms grant lessees the

"exclusive right and privilege to drill for, develop, and produce oil and gas resources," in exchange for an up-front cash bonus and periodic lease payments.

Obtaining a lease is one thing; obtaining the necessary permits to first explore and then produce is another. The OCSLA statutory scheme calls for specific submission and approval requirements for each step in the process of exploration, development, and production of OCS-derived oil or gas. In addition to approvals from the Department of the Interior ("DOI"), approvals may also be required from various state and federal agencies.

The first step in the process, exploration, begins with submittal by the lessee to the Secretary of a plan of exploration ("POE"). *See* 43 U.S.C. § 1340(b), (c)(1). The plan must comply with all provisions of the statute, the extensive regulations prescribed by the statute, and the terms of the lease. When the plan with such modifications as may be necessary are found by the Secretary to so comply, the Secretary must approve the POE within thirty days unless the Secretary determines that the proposed activity under the lease would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits, to the national security or defense, or the marine, coastal, or human environment, and the proposed activity cannot be modified to avoid such harm. *See id.* § 1340(c)(1) (1994) (incorporating the provisions of § 1334(a)(2)(A)(i)). The Secretary is authorized to suspend operations under the lease temporarily upon finding that a similar threat exists subsequently. *See id.* § 1334(a)(1)(B).

Once the POE is approved, the DOI may consider issuance of the permits and approvals that are required before actual drilling takes place. In applying for a required federal license or permit, an applicant whose activities will affect land or water uses in the coastal zone of a state--such as North Carolina--with a federally approved coastal zone

management program must provide to the federal licensing or permitting agency a certificate that its proposed activities comply with the state's approved program. *See* 16 U.S.C. § 1456(c)(2) (1994). The Coastal Zone Management Act ("CZMA") requires state concurrence with an applicant's consistency certification. *See id.* § 1456(c)(3)(B)(i). If the state objects, an applicant may appeal that determination to the Secretary of Commerce. *See id.* § 1456(c)(3)(B)(i)-(iii). The Secretary of Commerce has authority to override the state's objection by finding that the POE is consistent with the CZMA objectives or is otherwise necessary for national security interests. *See id.*

In addition to the requirement for an approved POE with state concurrence (or override) under the CZMA, if the POE includes discharge of pollutants into the ocean, a National Pollutant Discharge Elimination System ("NPDES") permit must be obtained from the Environmental Protection Agency ("EPA"). *See* Federal Water Pollution Control Act, 33 U.S.C. §§ 1311(a), 1342(a) (1994). Again, state concurrence under the CZMA is required before an NPDES permit may be granted. *See* 16 U.S.C. § 1456(c)(3)(A).

B.

The leases at issue were acquired in 1981 when Marathon Oil Company, Mobil Oil Exploration and Producing Southeast Inc., and Amerada Hess Corporation each bought 1/3 undivided interests in five North Carolina OCS leases. The three corporations each paid the Government more than $78 million in front-end cash bonuses and subsequently paid the Government approximately $264,000 in annual rentals during the ten year primary term.

The first planned activity involving the leased land resulted from the combination of Marathon and other North Carolina OCS lessees into a single entity known as the Manteo Unit. The Manteo Unit proposed drilling one

exploratory well about forty-five miles east of Cape Hatteras. In July, 1989, after initial objections to the proposed POE by the State of North Carolina, the state, the DOI, and the Manteo Unit operator entered into a Memorandum of Understanding ("MOU") calling for a special environmental review before the DOI would act on the Manteo Unit POE.

The Manteo Unit also needed to obtain a NPDES permit from the EPA for the POE. The permit was required because the POE included planned discharge of wastes into the ocean. *See* 33 U.S.C. §§ 1311(a), 1342(a).

The environmental review required by the MOU issued in June, 1990. Following review of the three-volume report, the DOI determined that the POE would not result in any significant environmental impacts and was deemed as far as the DOI was concerned, to be "approvable in all respects." However, on July 17, 1990, North Carolina objected to CZMA certification of Mobil's NPDES permit application.

Before any further action was taken, and before any permit requests were acted upon, Congress, in August, 1990, enacted the Outer Banks Protection Act ("OBPA") in direct response to environmental concerns raised by North Carolina. The OBPA essentially placed a temporary moratorium on exploration or development of the North Carolina OCS, and created an Environmental Sciences Review Panel ("ESRP") to study the impact of any proposed OCS development, *see* OBPA § 6003(c)(3)(A).

Specifically, the OBPA prohibited DOI from approving any POEs, PODs, or permits to drill on the North Carolina OCS until the later of October 1, 1991, or forty-five days of continuous congressional session following DOI's receipt of an ESRP report and submission of a certificate by the Secretary reporting that he had sufficient information to carry out his responsibilities under the OCSLA, *see id.* § 6003(c)(3)(A)(ii)(I). In light of the enactment of the

OBPA, the Mineral Management Service ("MMS") of the DOI suspended all leases offshore of North Carolina as of August 18, 1990, at the same time lifting the obligation to pay rentals on the leases.

In spite of the enactment of the OBPA, on August 20, 1990, Mobil, on behalf of the Manteo Unit, submitted its final plan of exploration to drill an exploratory well. On November 19, 1990, North Carolina officially objected to the Manteo Unit's certification that its exploration plan would comply with the CZMA. Unless overridden, North Carolina's objections to Mobil's CZMA certifications of the POE and the NPDES applications effectively barred the issuance of any of the requested permits or approvals for exploration.

The Manteo Unit partners pursued appeals of North Carolina's CZMA objections to the Secretary of Commerce. On September 2, 1994, Commerce found the proposed POE and proposed discharges of drilling wastes to be "neither consistent with the objectives of the CZMA nor necessary in the interests of national security," and declined to override North Carolina's objections.

In January, 1992, the ESRP issued a final report on the Manteo Unit POE to the Secretary of the Interior. The Secretary then issued a report to Congress in April, 1992, certifying that he possessed sufficient information to perform his obligations under the OCSLA for approval of the single-well POE. By the terms of the OPBA, the temporary moratorium imposed on secretarial action by the OPBA lifted after the next forty-five days of congressional session.

However, the Secretary on his own initiative then deferred approval of the POE until the MMS completed two ESRP-recommended studies. Following the Secretary's April 1992 certification, which MMS treated as lifting the OBPA's bar on exploration of the Manteo Unit, Mobil requested additional suspensions of the Manteo Unit leases until both

the additional ESRP studies were completed and Mobil's appeals of North Carolina's 1990 CZMA objections were decided.

MMS lifted the North Carolina OCS lease suspension in November, 1994, after the MMS released the two ESRP-recommended studies and the Secretary of Commerce had declined to override North Carolina's objections to the Manteo Unit POE and NPDES permit applications. Congress repealed the OBPA in 1996. *See* Pub.L. No. 104-134 Title I, Department of the Interior § 109, 110 Stat. 1321-177 (1996).

C.

In October 1992, Mobil and Marathon, together with a number of other OCS oil and gas lessees of the Government, intervened in a breach of contract action before the Court of Federal Claims between the United States and Conoco over OCS leases off the coasts of Alaska, Florida, and North Carolina. Eventually, all the OCS lessees reached compromise settlements with the Government, allowing entry of final judgments and cancellation of their leases. Marathon and Mobil, however, reserved the right to and maintained all claims with respect to the OBPA's effect on the OCS leases off the coast of North Carolina.

Thereafter, on cross-motions for summary judgment, the Court of Federal Claims held that the Government's "failure [to carry out its contractual obligations], under the restrictions adopted pursuant to the OBPA, was a material breach of the leases," entitling Mobil and Marathon to damages. *Conoco Inc. v. United States*, 35 Fed. Cl. 309, 331 (1996). The court reached its conclusion by finding that the OCS lease terms were not subject to future or subsequent statutes and their related regulations, including something as unforeseeable as OBPA. *See id.* at 323-24. Within the lease terms, the court found that the Government had a duty to

consider lessees' POEs in a timely and fair manner. *See id.* at 328. The Court of Federal Claims concluded that "compliance with the OBPA compelled governmental breach by non-performance accompanied by an anticipatory repudiation thereby giving rise to 'total breach.' " *Id.* at 327. In addition, the court determined that the Secretary of the Interior's powers under the OSCLA did not extend to the suspension of the leases for OBPA compliance. *See id.* at 329-30.

The court reviewed at length this court's opinion in *Winstar Corp. v. United States*, 64 F.3d 1531 (Fed.Cir.1995), *aff'd*, 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996), and its application to the circumstances under which the United States may be liable for breach despite the sovereign acts doctrine. *See id.* at 331-34. Applying the four *Winstar* factors, the court found that the United States was liable for breach stemming from the OBPA because the Act violated the objective intent of the parties to the OSC leases by prohibiting exploration and development, and because the parties' mutual assent as expressed in the leases cannot be subverted by a governmental change in environmental regulatory policies. *See id.* at 333-34.

The Court of Federal Claims rejected the government's defense of immunity under the sovereign acts doctrine. The court found that although the OBPA "may have been the result of developing environmental concerns, it was not an act of public, general applicability." *Conoco*, 35 Fed. Cl. at 336. Instead, the court determined that the OBPA was specifically targeted at the plaintiffs and prevented them from exercising their lease rights - exploration of the OCS offshore of North Carolina. *Id.* Because the OBPA "does not constitute a sovereign act," the court concluded that United States was liable for breach of contract. Id. In addition, the court determined that the related theory of unmistakability

was inapplicable since it "stands or falls with the sovereign acts doctrine." *Id.* at 335.

Subsequently, the Court of Federal Claims held a hearing to determine if restitution of lessees' cash bonuses and rentals should be offset by the amount of benefits received by lessees before enactment of the OBPA. The court concluded that the Government had failed to identify a legally cognizable benefit and issued judgment in favor of lessees for the $156 million cash bonuses paid, but found that lessees were not entitled to a return of their annual lease rental payments. The Government appeals from the judgment of liability for material breach of contract and from the trial court's restitutionary award.

DISCUSSION

If there are no material facts in dispute precluding summary judgment - and neither party argues there are - our task is to determine whether the judgment granted is correct as a matter of law. *See, e.g., Confederated Tribes of Colville Reservation v. United States*, 964 F.2d 1102, 1107 (Fed.Cir.1992).

A.

The first question raised is whether the OCS leases are by their terms subject to the OBPA. If the leases as written are expressly subject to future legislation such as the OBPA, then the Government's enactment and enforcement of that act cannot be a breach of the OCS leases. Section 1 of the OCS lease provides that the lease is issued pursuant to the OCSLA and is:

> [S]ubject to the [OCS Lands] Act; Sections 302 and 303 of the Department of Energy Organization Act ...; all regulations issued pursuant to such statutes and in existence upon the effective date of this lease; all regulations issued pursuant to such statutes in the future which provide for the prevention of waste and the conservation of the natural resources of the Outer Continental Shelf, ...; and all other applicable statutes and regulations.

(Emphasis added.) The Court of Federal Claims interpreted the phrase "all other applicable statutes and regulations" as not including subsequent legislation such as the OBPA. *See Conoco*, 35 Fed. Cl. at 322-24. We agree. To read the original contract between the parties as incorporating all future actions, whether by statute or regulation, by one of the parties would raise serious questions about illusory contracts, and perhaps questions of due process and other constitutional concerns. Before interpreting a contract in that manner, there would have to be a much clearer statement of the parties' intent to so contract. In any event, because the outcome of the case does not turn on this issue, we need not further dwell upon it.

We turn next to the question of the parties' obligations under the OCS lease. Lessees paid a substantial up-front cash bonus and annual rents in exchange for the "exclusive right and privilege to drill for, develop, and produce oil and gas resources." That right, however, was expressly conditioned on compliance with a complex fabric of statutory and regulatory provisions, which included involvement by both federal and state agencies. The lessees were both knowledgeable and sophisticated purchasers, and entered into these leases with their legal eyes wide open.

Section 10 of the lease, entitled "Performance," specifically states that lessees "shall comply with all regulations and orders relating to exploration, development, and production." Pursuant to the OCSLA and relevant regulations, lessees must obtain federal and state approvals and certifications before they may explore or develop the

leased areas. *See* 43 U.S.C. § 1340. Accordingly, under the OCS lease, lessees' performance included obtaining the necessary federal and state approvals for exploration, development, and production.

As explained earlier, the regulatory scheme requires that lessees submit a POE for the Secretary of Interior's approval. *See id.* § 1340(c)(1). If the Secretary approves the POE, he may grant an exploratory license or permit if there is state concurrence under the CZMA; however, the statute is clear that:

> The Secretary shall not grant any license or permit for any activity described in detail in an exploration plan and affecting any land use or water use in the coastal zone of a State with a coastal zone management program ... unless the State concurs or is conclusively presumed to concur with the consistency certification accompanying such plan ... or the Secretary of Commerce makes ... [such a] finding....

43 U.S.C. § 1340(c)(2) (1994).

In this case, North Carolina objected from the beginning to the Manteo Unit's proposed exploration as being inconsistent with its coastal zone program under the CZMA. This led to the MOU between the Manteo Unit, the DOI, and the State of North Carolina in 1989. Pursuant to the MOU, MMS issued an environmental report in June, 1990. Although the DOI then concluded that the Manteo Unit's POE "complied in all respects with [DOI] regulations" and "[t]he Plan, together with its supporting information, [was] deemed to be approvable in all respects," this did not dispose of North Carolina's objections. Furthermore, North Carolina registered its objections to Mobil's and Marathon's NPDES certification of consistency in July 1990, and restated its

objections to their POE's certification of consistency in November 1990; North Carolina maintained both of these objections throughout the time that the moratorium imposed by the OBPA was effective.

Whatever restraints on secretarial actions were imposed by the OBPA essentially had no effect upon these OCS leases because exploration could not proceed without North Carolina's concurrence in the POE's CZMA consistency certification or the override provided by law. *Cf. Secretary of the Interior v. California*, 464 U.S. 312, 341, 104 S.Ct. 656, 78 L.Ed.2d 496 (1984) (observing that states with approved CZMA plans "retain considerable authority to veto inconsistent exploration or development and production plans"). Thus, North Carolina's legally valid objection to the consistency certification left unfulfilled the lessee's obligation under the contract to demonstrate compliance with applicable statutes and regulations, compliance with which was a prerequisite to obtaining the necessary permits and approvals.

Lessees have not established that the delays that occurred in obtaining secretarial approval of the POE were caused by the moratorium rather than by the fact that they were unable to provide the necessary state concurrence to their certification of CZMA compliance. And even if the Secretary had felt constrained in acting on the application by the provisions of the OBPA, the law is clear that, had he been free to act, he could not have issued any permits for exploration so long as North Carolina's objections remained in force. *See Sun Oil Co. v. United States*, 215 Ct.Cl. 716, 572 F.2d 786, 804-06 (1978) (finding that government delay in permit approval was irrelevant because it was not the primary cause of delay).

Congress specifically conditioned offshore oil exploration on the principle that environmental factors could not be ignored, and specifically made the activity subject to

express compliance with extant coastal zone management programs. Under the circumstances of this case, to treat the denial of the POE as a breach of contract by the Government would be to eviscerate these salutary protections of the nation's fragile coastal lands and waters. The trial court viewed the moratorium imposed by the OBPA as having indefinite duration and unavoidable consequences. In fact, appellees' failure to overcome North Carolina's objections resulted in a delay that preceded and extended throughout the period in which the OBPA was effective. Appellees cannot recover for this delay. *See William F. Klingensmith, Inc. v. United States*, 731 F.2d 805, 809 (Fed.Cir.1984) (stating the general rule that courts will deny recovery where both parties contribute to the delay and the contractor has not established its delay apart from that attributable to the government); *Law v. United States*, 195 Ct.Cl. 370, 385 (1971) (placing burden on contractor to show that the work was delayed due to the lack of approval); *Wunderlich Contracting Co. v. United States*, 173 Ct.Cl. 180, 351 F.2d 956, 964-65 (1965) (noting that the "proliferating effects" of the Korean war contributed heavily to the difficulties encountered and that plaintiffs failed to carry their burden in proving that the delays or extra expenses were directly caused by the Government's actions); *Commerce Int'l Co. v. United States*, 167 Ct.Cl. 529, 338 F.2d 81, 89-90 (1964) (applying the rule that "there can be no recovery where the defendant's delay is concurrent or intertwined with other delays").

Marathon argues that this case is not just about a delay in the approval of the POE for the North Carolina OCS leases. Appellees characterize the OBPA as constituting a "continuing, open-ended prohibition of any exploration of the North Carolina OCS and any development and production of oil and gas resources in that area." For the reasons noted, that is not a correct description of the OBPA. Even if it were, the argument ignores the fact that the lessees had failed to

submit a POE that carried with it state concurrence with the CZMA consistency certification. The record shows that the state's objection to appellees' NPDES permit application was based on "Mobil's failure to provide data and information necessary to allow the State to conduct a proper consistency review of the proposal on its merits." Likewise, North Carolina's objection to the Manteo Unit POE CZMA consistency certification was due to the inadequacy of the information provided by Mobil.

Had North Carolina concurred in the CZMA certification of the POE, and the Secretary refused to grant a permit or license due to the OBPA, then appellees' contentions might have merit because they could invoke the contract law principle that a party hindering the other's performance is considered in breach. *See Wah Chang Corp. v. United States*, 151 Ct.Cl. 41, 282 F.2d 728, 733 (1960); *see also* THOMAS J. TOUHEY ET AL., 4 GOVERNMENT CONTRACTS § 28.40 [2], at 28-111 (1998) ("When the contract requires the possession of a permit or license from a state, municipality, or other authorizing agency, any delay in obtaining such a permit or license is a matter between the contractor and the issuing authority, unless the government in some manner has caused or contributed to the delay."); WALTER H.E. JAEGER, 5 WILLISTON ON CONTRACTS § 670, at 159 (3d ed.1961). But that is not the case before us.

Appellees argue further that North Carolina's CZMA consistency objection was not independent of the Government's actions because the Secretary of Commerce rejected lessees' request to override North Carolina's CZMA objections based "in large part on the OBPA and on the findings of the OBPA Panel." It appears from this that appellees' real complaint is that the Secretary of Commerce refused to override North Carolina's CZMA objections; this

issue is not before us on appeal so we do not address it further.[1]

We have considered appellees' remaining arguments regarding contract breach, and find them unpersuasive.

B.

[3] Appellees argue that even if their leases are subject to state objection over the CZMA consistency certification, the OCSLA provides for cancellation of the leases and restitution in such a situation. In support of their contention, Marathon claims that 43 U.S.C. § 1337(b)(4) "shows that Congress intended lessees to receive compensation for their leases if the Government in any way precluded them from exploration." Section 1337(b)(4) entitles the lessee to "explore, develop, and produce the oil and gas contained within the lease area, conditioned upon due diligence requirements and the approval of the development and production plan required by this subchapter." We fail to see how this language shows any such intent. The OCSLA does give the Secretary authority to cancel the leases under certain circumstances, entitling a lessee to compensation. *See* 43 U.S.C. §§ 1334(a)(2), (c)-(d); 1340(c)(1); 1351(h)(1)-(2). However, 43 U.S.C. § 1351(h)(2)(A) clearly states that "lessee shall not be entitled to compensation" because of secretarial disapproval of activities that "do not receive concurrence by such State with respect to the consistency certification accompanying such plan pursuant to ... such Act [16 U.S.C. § 1456(c)(3)(B)(i) or (ii)] and the Secretary of Commerce does not make the finding authorized by such Act

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[1] We note that appellees have filed an action challenging the Secretary of Commerce's decision. See Mobil Oil Exploration v. Brown, 920 F.Supp. 1 (D.D.C.1996).

[16 U.S.C. § 1456(c)(3)(B)(iii)]," *see* 43 U.S.C. §§ 1351(h)(1), (h)(1)(B).

Under these circumstances, a lessee's options are to "submit an amendment to such plan, or a new plan, to the Secretary of the Interior." *See* 16 U.S.C. § 1456(c)(3)(B). Furthermore, we note that under contract section 23, it is the Government's option to cancel the lease in a situation in which the lessees did not comply with OCSLA provisions because of their failure to obtain state concurrence.

Nor is there any other basis under the lease for the lessees to claim restitution of some or all of their money. The OCS lease grants lessees the "exclusive right and privilege to drill for, develop, and produce oil and gas resources," in exchange for an up-front cash bonus and periodic lease payments. This right, however, is contingent upon lessees' agreement to "comply with all regulations and orders relating to exploration," including the need for federal and state approvals. Therefore, "[u]nder the plain language of OCSLA, the purchase of a lease entails no right to proceed with full exploration, development, or production ...; the lessee acquires only a priority in submitting plans to conduct those activities ... [upon disapproval] no further exploration or development is permitted." *Secretary of the Interior v. California*, 464 U.S. at 339, 104 S.Ct. 656.

The Supreme Court has recognized that only the major oil companies can "risk paying a large [up-front] cash bonus to lease a tract of unknown value." *See Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 154, 102 S.Ct. 205, 70 L.Ed.2d 309 (1981). In this case, Mobil and Marathon bid and paid the cash bonuses on the expectation that the leased lands contained substantial oil reserves and could be made productive. *See* James C. Cox et al., *OCS Leasing and Auctions: Incentives and the Performance of Alternative Bidding Institutions*, 2 SUP.CT. ECON. REV. 43, 51-52, 54 (1983) (explaining that a bidding process like the OCS lease

system which produces a variable, high cash bonus combined with a fixed, low royalty rate places most of the development risk upon the winning bidder rather than on the Government). We see no principled distinction between a lessee whose hopes for large rewards from such a lease are frustrated by a failure to obtain the necessary permits for exploration, and those of a lessee whose hopes are drowned by impossible weather, equipment failures, financial setbacks, or any number of other circumstances beyond the lessee's control. In either case, the lessee contracted for the exclusive opportunity to explore in a certain area; the inability of a lessee to explore, if not attributable to the Government, does not create an entitlement to any refund of the consideration paid to obtain the lease. *See* Touhey et al., *supra* § 28.40[2], at 28-111; *cf. Sun Oil*, 572 F.2d at 806.

Since we find no basis for a restitutionary remedy, we need not address the parties' contentions with respect to the manner in which the Court of Federal Claims calculated the amount of restitution.

CONCLUSION

The OBPA was not the cause of Marathon's inability to obtain issuance of the required permits and approvals for its proposed oil exploration, and there is no other evidence of a breach of contract by the United States. There is no other basis on which Marathon can claim a return of its contract payments. The judgment of the Court of Federal Claims in Marathon's favor is

REVERSED.

PAULINE NEWMAN, Circuit Judge, dissenting.

I respectfully dissent from the reversal of the relief granted by the Court of Federal Claims. Although I agree that the United States did not breach this contract by deliberate acts in its derogation, as in the *Winstar* cases, it

can not be gainsaid that the contract was made impossible of performance, whether as a matter of legislation, discretion, federalism, or politics, due to the continuing intervention of the State of North Carolina. In such case the contract was voided without the fault of either party, and Marathon and Mobil are entitled to relief in rescission and restitution. That is all the relief that was granted by the Court of Federal Claims. I would affirm the judgment of that court.

UNITED STATES COURT OF FEDERAL CLAIMS

No. 92-331C

CONOCO INC.,
Plaintiff,

AMERADA HESS CORPORATION, *ET AL.*,
Third-Party Plaintiffs,

v.

The UNITED STATES,
Defendant.

Decided: April 1, 1996

The Opinion previously issued on March 14, 1996, is withdrawn and is substituted by the Opinion issued this date.

Before ROBINSON, Judge

OPINION

ROBINSON, Judge:

This matter originally came before the court on defendant's motion for summary judgment, Conoco Inc.'s ("Conoco") cross-motion for partial summary judgment, and third-party plaintiffs' ("plaintiffs") cross-motion for partial summary judgment. Oral argument was held on January 31, 1995.

On June 23, 1995, and August 8, 9 and 10, 1995, the court entered judgment pursuant to the some of the parties' joint motions to dismiss and stipulations for compromise settlements, pursuant to which, the Florida and Alaska lease claims of Conoco and plaintiffs were settled. Moreover, the North Carolina claims of Shell Offshore Inc., Shell Frontier

Oil & Gas Inc., Shell Western E & P Inc., OXY USA Inc., and Conoco have also been settled. After settlement of the issues presented with respect to various oil and gas leases in the Gulf of Mexico, Bristol Bay, Alaska, and some of the leases offshore North Carolina, this case now involves only the remaining oil and gas leases granted by various government contracts to the remaining plaintiffs involving the Outer Continental Shelf ("OCS") off the coast of North Carolina, which plaintiffs purchased in competitive sales at various times in the 1980s.

In 1992, Conoco filed suit in this court alleging that certain legislative actions of defendant materially breached the contracts at issue, frustrated performance thereof, rendered such performance impracticable, or constituted a taking in violation of the Fifth Amendment of the United States Constitution. Other oil and gas companies[1] holding similarly affected leases were notified of their interests in the case pursuant to Rule 14(a)(1) and (b) of the Rules of the United States Court of Federal Claims ("RCFC"). As a result, nine of these oil companies filed suit on October 28, 1992 as third- party plaintiffs. These third-party plaintiffs included: Amerada Hess Corporation, Chevron USA Inc., Marathon Oil Company, Mobil Exploration & Producing U.S. Inc., Murphy Exploration & Production Company, Murphy Oil USA, Inc., OXY USA Inc., Pennzoil Exploration

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[1] Amerada Hess Corporation, Amoco Production Co., Chevron USA Inc., Marathon Oil Company, Mobil Oil Corporation, Mobil Exploration and Producing Southeast Inc., Mobil Exploration and Producing U.S. Inc., Mobil Exploration and Producing North America Inc., Murphy Exploration & Production Company, Murphy Oil USA, Inc., Odeco Oil & Gas Company, OXY USA Inc., Pennzoil Exploration and Production Company, Shell Offshore Inc., Shell Frontier Oil & Gas Inc., Shell Western E & P Inc., Texaco Inc., Texaco Exploration and Production, Inc., Union Oil Company of California.

& Production Company, and Shell Offshore Inc.. Then, on October 28, 1995, eight more oil companies filed an RCFC 24 motion to intervene. The court granted their motion, and Amoco Production Company, Mobil Oil Corporation, Mobil Exploration & Producing North America Inc., Mobil Exploration & Producing Southeast Inc., Shell Frontier Oil & Gas Inc., Shell Western E & P Inc., Texaco Exploration and Production, Texaco Inc., and Union Oil Company of California were included in the case as intervenors.

In brief, plaintiffs' complaints seek damages for breach of contract, restitution for the money paid in bonuses and annual rental payments, or, alternatively, the fair market value of the taken property. However, as will be discussed later, plaintiffs' motions do not require a ruling upon the taking issue. Defendant denies that any breach, frustration, or circumvention of the lease contracts or taking of plaintiffs' rights granted under the leases has occurred. By its motion for summary judgment, defendant seeks a ruling in its favor on all counts in plaintiffs' complaints. According to defendant, all of the government's actions were fully authorized by the lease agreements and, in any event, such actions, because of their broad public nature, have not given rise to any rights to recover compensation in damages for breach or restitution because they are shielded by the sovereign acts and unmistakability doctrines. Plaintiffs have moved for partial summary judgment on the breach of contract and restitution issues. For the reasons set forth below, plaintiffs' cross- motion for partial summary judgment is granted. With respect to defendant's motion for summary judgment on the taking issue, the court concludes that there is neither need nor sufficient evidence to resolve that issue in this opinion.

BACKGROUND

The OCS is the submerged land beneath navigable waters on the Continental Shelf beginning seaward of the

coastal waters within the jurisdiction of the individual states. 43 U.S.C. §§ 1301(a), (b), 1331(a). Coastal states assert jurisdiction over the waters and submerged lands within three miles of their coasts; the OCS extends from these boundary lines outward. Id. The federal government asserts jurisdiction over the OCS and the mineral resources found there via the Outer Continental Shelf Lands Act ("OCSLA" or "the Act"), 43 U.S.C. § 1331 et seq.[2]

I. Lease Acquisition

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[2] The OCSLA was passed in 1953 in order to establish the federal government's exclusive jurisdiction over the OCS and to foster the exploitation of the OCS's resources. Over the past forty-two years, over one hundred oil and gas lease sales have been conducted under the OCSLA and successful bidders have paid over $55 billion to the United States Treasury for the right to explore, develop and produce minerals under such leases. In 1978, Congress, in light of the country's pressing energy needs, overhauled the OCSLA and adopted a new statutory regime designed to serve a new declaration of national policy, one permitting "expeditious and orderly development subject to environmental safeguards ..." 43 U.S.C. § 1332(3) (1988). However, the 1978 amendments also established detailed procedures and criteria for the Secretary of the Interior to follow in exercising his authority to grant leases. In sum, the OCSLA provided for the expeditious and orderly development of the OCS subject to environmental safeguards under a 4-phase framework: (1) preparation of a 5-year leasing plan; (2) lease sales; (3) lease exploration; and (4) lease development and production. Also, the Secretary was granted carefully limited authority to cancel a lease upon finding that the threat of "environmental harm" outweighed the advantage of continuing activity on the lease. Because Congress recognized that "environmental" cancellations would not be the fault of the lessees, Congress supplemented the lessee's other remedies for such cancellations with a statutory compensation formula. 43 U.S.C. §§ 1334(a), 1351(e). This 1978 legislation recognized that the "basic purpose" of the new regime was to promote the swift, orderly and efficient exploitation of the country's untapped domestic oil and gas resources in the OCS.

The OCSLA authorizes the Secretary of the Interior ("SOI" or "Secretary") to sell leases to explore for oil and gas within the OCS through a competitive bidding system. 43 U.S.C. § 1337. The sale of OCS leases is a complicated multi-step process involving defined actions by the Secretary and other state and federal agencies. Among other things, the Secretary must formulate a five- year oil and gas leasing program that sets forth a schedule of proposed lease sales and indicates the size, timing, and location of leasing activity and reflecting, to the maximum extent possible, "a proper balance between the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone." 43 U.S.C. § 1344(a). Prior to a lease sale, the Secretary must publish in the Federal Register a call for information regarding industry interest and environmental concerns relating to the proposed sale. 43 U.S.C. § 1344(c), (f). At least six months prior to a lease sale, the Secretary must study the sale's potential environmental impacts and issue a draft environmental impact statement ("EIS") regarding the lease sale followed by a period of hearings and comments leading to the approval of a final EIS. 43 U.S.C. § 1346(a). Next, the Secretary must make a preliminary decision about whether to proceed with the sale, based on information and options collected in a Secretarial Issue Document. If the decision is to proceed, the Secretary must publish a proposed Notice of Sale in the Federal Register. Thereafter, the Secretary must formally consult with the governors of affected states concerning the proposed Notice of Sale. If the Secretary decides to go forward with the sale, he must decide on how to conduct the lease sale and publish a final Notice of Sale, identifying the blocks available for leasing and the bidding system to be used. 43 U.S.C. § 1337(a)(8). After a waiting period of at least thirty days after the invitation for bids ("IFB") has been issued, the Secretary receives sealed competitive bids on the appointed day of sale and reviews them to determine the

leases to be issued. Finally, a lease may be issued to each of the successful bidders. The Department of the Interior ("DOI") then issues OCS leases on standard, non-negotiable lease forms prepared by the DOI. Under the leases, the United States of America is the "Lessor." The "leased area" is generally a three-square mile tract. The terms of the leases usually are for five or ten years, but the terms are extendable so long as drilling or production is taking place on a leased tract. All OCS lessees must pay large cash bonuses as well as periodic lease payments for the potentially petrolific tracts they acquire. 43 U.S.C. § 1337.

In August 1981, August 1982, and September 1983, the government conducted lease Sale Nos. 56, 78 and RS-2 for fifty-three tracts off the coast of North Carolina (the "North Carolina leases"). Some of the tracts included in these sales, including several in the "Manteo" area of the OCS, were in deep water; technological and safety concerns had been voiced about leasing in that area. Plaintiffs,[3] or their predecessors in interest, paid a total of $354,658,363.80 in bonuses for the North Carolina leases and a total of $8,557,447.38 in annual rentals. Parties' Stipulations at 77-83. Of this amount, Conoco claimed that it paid $20,974,916 to purchase interests in nineteen leases offshore North Carolina and for the opportunity to explore oil and gas deposits, while third-party plaintiffs claim that they paid the government $341 million in bonuses and rentals for the leases. These leases are not adjacent to areas where production is already occurring. Accordingly, exploration of

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[3] These plaintiffs originally included: Conoco Inc., Amerada Hess Corporation, Amoco Production Company, Chevron USA Inc., Marathon Oil Company, Mobil Exploration and Producing Southeast Inc., Murphy Exploration & Production Company, OXY USA Inc., Shell Offshore Inc., and Union Oil Company of California.

the tracts is an essential first step to determination of whether the leases have any ultimate value.

Under the OCSLA's statutory scheme, after acquiring these OCS leases, a lessee had to obtain not only the DOI's approval but also that of any involved state and federal agencies before taking any further action under the leases.[4] After the Secretary's approval of a plan of exploration ("POE") and completion of successful exploration operations, but prior to any oil and gas development and production pursuant to an OCS lease, a lessee must next submit a development and production plan to the Secretary for approval. 43 U.S.C. § 1351(a)(1). The production plan must include a description of the type and location of facilities and operations to be used, "the land, labor, material, and energy requirements associated with such facilities and operations" and the environmental and safety safeguards to be used. 43 U.S.C. § 1351(a)(2). Plans must also include specific work to be performed. 43 U.S.C. § 1351(c). Before a development plan may be approved and a permit granted,

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[4] Prior to commencing actual exploration activity pursuant to a lease, each lessee had to submit for approval by the Secretary a plan of exploration ("POE"), containing a schedule of anticipated exploration activities, a description of the equipment to be used, the location of each well to be drilled, and other pertinent information. 43 U.S.C. § 1340(c)(1), (3). The Secretary is required to approve the plan within thirty days if the requirements of the OCSLA and the regulations prescribed thereunder are met. However, if the Secretary determines that the proposed activity would likely cause serious harm or damage to life, property, mineral deposits, the national security or defense, or the marine, coastal or human environment, and the proposed activity cannot be modified to avoid such harm, the Secretary may not approve the plan. 43 U.S.C. § 1340(c)(1). The state's approval under the Coastal Zone Management Act of 1972 ("CZMA") may also be required, 43 U.S.C. § 1340(c)(2), and no exploration under the leases may commence until the exploration plan is fully approved.

the state must concur with the plan under the CZMA or the Secretary must make the appropriate findings under that act. 43 U.S.C. § 1351(d). Finally, the Secretary must issue a final EIS pursuant to the National Environmental Policy Act of 1969 ("NEPA"). If the lessee's development plan fails to provide adequate environmental safeguards, the Secretary must require modification to ensure compliance.

II. Lease Terms

The critical terms of the leases at issue are substantively identical. *See* Parties' Stipulations § 124 *et seq.*, at 55ff. The leases were entered into by and between the United States as lessor and plaintiffs as lessees. The lease agreements set forth the terms of the contracts as well as the rights and privileges conferred on the lessees. First and perhaps most importantly, the lease contracts provide:

> Sec. 1. Statutes and Regulations. This lease is issued pursuant to the Outer Continental Shelf Lands Act of August 7, 1953, 67 Stat. 462; 43 U.S.C. [§] 1331 et seq., as amended (92 Stat. 629), (hereinafter called the "Act"). The lease is issued subject to the Act; [Sections 302 and 303 of the Department of Energy Organization Act, 91 Stat. 578, 42 U.S.C. [§§] 7152 and 7153;] all regulations issued pursuant to the statute and in existence upon the Effective Date of this lease; all regulations issued pursuant to the statute in the future which provide for the prevention of waste and conservation of the natural resources of the Outer Continental Shelf, and the protection of correlative rights therein; and all other applicable statutes and regulations.

See Stipulated Exhibits ("SXs") 128-180, Sec. 1.

> Sec. 2. Rights of Lessee. The Lessor hereby grants and leases to the Lessee the exclusive right and privilege to drill for, develop, and produce oil and gas resources, except helium gas, in the submerged lands of the Outer Continental Shelf containing approximately ... acres or ... hectares....

These rights include:

> (a) the nonexclusive right to conduct within the leased area geological and geophysical explorations in accordance with applicable regulations;
>
> (b) the nonexclusive right to drill water wells within the leased area, unless the water is part of geopressured-geothermal and associated resources, and to use the water produced therefrom for operations pursuant to the Act free of cost, on the condition that the drilling is conducted in accordance with procedures approved by the Director of the Minerals Management Service or the Director's delegate (hereinafter called the "Director"); and
>
> (c) the right to construct or erect and to maintain within the leased area artificial islands, installations, and other devices permanently or temporarily attached to the seabed and other works and structures necessary to the full enjoyment of the lease, subject to compliance with applicable laws and regulations.

See Id., Sec. 2.

In regard to performance, Sec. 10 of the leases contain a provision requiring that the lessees comply with all regulations and orders relating to exploration, development and production. The lease terms also contain a provision in Sec. 13 stating, "The Lessor may suspend or cancel this lease pursuant to Section 5 of the [OCSLA] and compensation shall be paid when provided by the Act." Section 5 of the OCSLA does not discuss lease suspensions.

III. Post-lease Legislative Actions

The owners of twenty-one of the North Carolina leases combined their leases into a single unit, the Manteo Unit, and proposed to drill one exploratory well about forty-five miles east of Cape Hatteras. The State of North Carolina expressed strong objections to the proposed well. In July 1989, a Memorandum of Understanding ("MOU") was reached among the State of North Carolina, the DOI, and the operator of the Manteo unit (a subsidiary of Mobil Oil Corporation), which provided for a special environmental review before the DOI could act on the Manteo Unit's POE.

In August 1990, as a result of enhanced environmental concerns and the successful legislative efforts of Congressman Walter Jones of North Carolina, Congress enacted the Outer Banks Protection Act ("OBPA") as part of a more comprehensive oil spill legislation package, which came immediately prior to Mobil's submission to the Secretary of a POE for the single Manteo Unit exploratory well. A month after the passage of the OBPA, in September 1990, the DOI announced that this POE would have been approved if not for the prohibitions contained in the OBPA. The OBPA directly impacted the OCSLA and profoundly affected plaintiffs' North Carolina leases. Without amending the OCSLA, the OBPA expressly prohibited the DOI from approving any POEs or otherwise permitting exploration, production, or development of the OCS offshore North Carolina until at least October 1, 1991. Thereafter, such

activity was to be permitted only after the Secretary certified to Congress that he has "sufficient" information to carry out his responsibilities under the OCSLA in approving a submitted POE and then the Secretary was required to wait at least "45 days" of continuous Congressional session to pass before approval could occur.[5]

The OBPA also provides that before the Secretary may make a certification to Congress, an Environmental Sciences Review Panel ("ESRP") must be convened to make findings and recommendations regarding the adequacy of available environmental data, including oceanographic, ecological, and sociological data, to make decisions regarding the exploration and development of the OCS offshore North Carolina. If the Secretary's certification differs from the ESRP's findings and recommendations, the certification must

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[5] With respect to this embargo prior to October 1, 1991, the OBPA provides:

> (c) Prohibition of oil and gas leasing, exploration, and development
>
> Prohibition
>
> The Secretary of the Interior shall not--
>
> (A) conduct a lease sale;
>
> (B) issue any new leases;
>
> (C) approve any exploration plan;
>
> (D) approve any development and production plan;
>
> (E) approve any application for permit to drill; or
>
> (F) permit any drilling,
>
> for oil or gas under the Outer Continental Shelf Lands Act [ ] on any lands of the Outer Continental Shelf offshore North Carolina.

33 U.S.C. § 2753(c)(1) (emphasis added).

provide a detailed justification for the differences. Only after these steps have been taken may the Secretary approve a POE on behalf of the DOI. Moreover, even if a lessee is able to obtain the Secretary's approval of a POE, these same restrictive procedures then must be followed in order to obtain approval of a plan of development.

The report of the ESRP was not submitted until January, 1992. As of February 15, 1994, studies regarding the Manteo Unit well were still being reviewed. Approval of drilling of this single exploratory well was delayed by the OBPA from its August 1990 effective date until early 1994. All operations under plaintiffs' North Carolina leases are currently suspended, in some cases since as early as October 1988. In each instance, the lease terms have been concomitantly extended and the rental payments suspended.

CONTENTIONS OF THE PARTIES

I. Plaintiffs' Contentions

Plaintiffs complain that after paying large sums of money to acquire these leases, the enactment and enforcement of subsequent legislation, the OBPA, materially breached binding contracts, the leases, into which the United States, as a party, had entered into with them and, further, that such legislation has not only made it impossible for them to take advantage of their leases but also has interfered with the Secretary's ability to perform his contractual duties. Plaintiffs contend that because of such material breaches by defendant, including the Secretary's failure to timely consider plaintiffs' POEs under the OCSLA, which the OBPA did not expressly repeal, defendant is liable to plaintiffs for damages. In this regard plaintiffs contend that although the DOI's standard lease forms do not explicitly state the lessor's obligations regarding approval of submitted POEs, in light of the express terms of the leases and the circumstances of their sale, the lessor nevertheless is contractually bound to fairly

consider and expeditiously act upon the lessees' POEs as well as any subsequent development and production plans that might follow. Otherwise, the bargain between the lessor and lessees would be illusory and would permit defendant's unilateral forfeiture of plaintiffs' lease bonuses with impunity. They argue forcefully that this is particularly true here because the government drafted the lease terms which were not subject to negotiation. Accordingly, plaintiffs seek restitution of the money they have paid to defendant in bonuses and annual rentals. Plaintiffs do not claim that defendant's failure to approve plaintiffs' POEs and grant the necessary permits breached their lease contracts, but only that defendant's failure at least to fairly consider their plans was a material breach.

Plaintiffs argue that even if the enactment of the OBPA is viewed only as a delay in exploration, defendant still has materially breached the leases. According to plaintiffs, there is a duty of good faith implied in every contract that neither party to a contract will do anything to prevent, hinder, or delay performance of the other party to that contract. Moreover, plaintiffs say that the contracts for the exploration or production of oil and gas contain covenants that the lessor will not delay development of the leased tracts. But, in contravention of such covenants, plaintiffs maintain that defendant has deliberately prevented them from receiving any benefits from their leases for years, and that such delay, which continues to this day, constitutes a material contract breach.

In the alternative, plaintiffs also contend that the OBPA has frustrated their performance of the leases, thereby entitling them to restitution. Plaintiffs say that a party's duty to perform under a contract may be discharged where an unexpected contingency occurs, the risk of which was not allocated to either party, and which renders performance impracticable. Since the principal purpose of the leases has

been frustrated, plaintiffs argue that their lease contracts should be deemed a nullity.

In sum, plaintiffs argue that by virtue of the terms of the leases, defendant was contractually obligated at least to fairly consider plaintiffs' POEs within a reasonable time after their submission and that, because of passage of the OBPA, when the DOI was divested of its power to properly and timely consider plaintiffs' POEs and either approve or disapprove them based upon their respective merits, defendant was in breach. Plaintiffs contend that not one of the defenses defendant has interposed, including the sovereign acts and unmistakability doctrines, has merit. Accordingly, plaintiffs seek a finding of a breach of their lease contracts and a judgment awarding damages. Alternatively, plaintiffs seek contract rescission and restitution of all payments made to the government.

II. Defendant's Contentions

A. Lease Rights and Expectancies

Defendant contends that the OCS leases do not grant plaintiffs an absolute right to explore or develop the areas subject to their leases. It argues that the sale of a lease is a distinct stage of the OCS administrative process, separate from the issuance of a federal permit to explore or develop. In other words, defendant claims that plaintiffs purchased the leases knowing full well that they might never be able to exploit them. According to defendant "an OCS lease only grants its holder a priority over others to subsequently submit [sic] for federal approval plans for exploration, production, or development." Nothing in the leases, says defendant, guarantees the lessees that any of permits will ultimately be granted.

Since the leases unequivocally state they are subject to the OCSLA, its regulations, and all other applicable statutes and regulations, defendant argues that plaintiffs had notice

that the OCSLA establishes many requirements which have to be met before a permit for exploration can be granted. Defendant points out that plaintiffs were aware that the environmental impacts of their proposed activities had to be carefully studied and that their permits could be denied. Moreover, defendant says that even with approved POEs, lessees must then apply for permits to drill, which also require vast amounts of technical data, compliance with other acts, regulations and state and other environmental laws.

Defendant denies that it has breached any of the lease contracts or taken any property interest of plaintiffs and moves for summary judgment on all counts, including whether there has been a taking of plaintiffs' property interest in the North Carolina leases. Defendant essentially argues that plaintiffs' defined rights and expectancies as set forth in the lease agreements were extremely limited and that all actions taken by the government, i.e., enacting the OBPA and suspending the leases, were all contemplated by the lease agreements themselves. According to defendant, it has not breached the lease agreements because it has only suspended the leases and the regulations incorporated into the leases permit lease suspensions.

B. The effect of the OBPA suspensions

Defendant argues that the OBPA suspensions neither breach nor frustrate the purpose of the lease contracts. In this regard, defendant states that only three POEs were ever submitted for DOI approval by certain of the plaintiffs holding North Carolina leases.[6] Thus, defendant argues that

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[6] Third-party plaintiff Chevron submitted and subsequently received DOI approval of its POE but never took further steps to explore its tract. Arco Exploration Company also received DOI approval of its POE along with North Carolina's concurrence but never actually explored its tract either.

the OBPA did not bar exploration and development from ever occurring, but only imposed certain additional requirements on the DOI before it could approve a drilling permit. Further, defendant argues that plaintiffs have suffered no material harm due to the suspension of the North Carolina leases and the delayed CZMA review process for the Manteo Unit, because even if there were no OBPA, the status of plaintiffs' POEs would be no different than they presently are. According to defendant, plaintiffs cannot recover damages due to a delay unless that delay is solely attributable to defendant's unauthorized, improper acts which, according to defendant, have not occurred. Defendant argues the delay in implementing the pending POE for the Manteo Unit has actually been caused by plaintiffs' own inability to obtain CZMA concurrence from North Carolina. Defendant contends that suspension of the North Carolina leases is consistent with the terms of the leases. It says that the OBPA states that if insufficient information exists regarding the impact of oil and gas operations on the North Carolina OCS, the DOI must engage in further environmental review. Additionally, defendant argues that the OBPA is contemplated under the leases because it is "an applicable statute" as described in the leases here at issue.

Defendant argues that, in any event, the sovereign acts and unmistakability doctrines shield the government from liability.[7] Finally, defendant argues that plaintiffs did not

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[7] The sovereign acts doctrine shields the United States from liability for a breach of contract when federal legislative or executive actions interfere with a governmental contract when the interfering governmental action is "public and general." The unmistakability doctrine, which is closely tied to the sovereign acts doctrine, says that the government contractually waives neither its sovereign immunity nor its sovereign power to legislate, regulate, or tax unless that power is surrendered in "unmistakable terms."

possess any expectancies that could be taken and, even if they did, the government's actions with respect to the North Carolina leases fall short of a taking in violation of the Fifth Amendment.

In sum, Defendant counters that plaintiffs' rights and expectancies as defined by the lease agreements were extremely limited, that all actions taken by defendant, i.e., suspending the leases, were contemplated by or specifically allowed by the plain meaning of the lease contracts, that the OBPA's added restrictions and the extent that plaintiffs' rights were limited thereby were shielded by the sovereign acts and unmistakability doctrines and that no taking has occurred in violation of the Fifth Amendment by virtue of passage of the OBPA.

DISCUSSION

Summary judgment pursuant to RCFC 56(c) is the appropriate means for disposing of a case or issue in which the movant or cross-movant is entitled to judgment as a matter of law and there are no genuine issues of material fact in dispute. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986). The standard for whether there is a material issue of disputed fact is whether a reasonable finder of fact could return a verdict in favor of the non-movant. *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562 (Fed.Cir.1987). In determining entitlement to summary judgment, the court may look beyond the pleadings to determine in which party's favor the questions of law will be resolved and whether any apparent issues of fact are merely illusory.

I. Contract Interpretation

A. Generally

Breach of contract is the central issue presented by the parties' respective motions for (partial) summary judgment. In order to decide this issue, as a threshold matter, it is necessary to ascertain the exact meaning of the contract terms, which define the parties' rights, liabilities, and responsibilities. Thus, in this case, contract interpretation necessarily precedes breach analysis. The purpose of contract interpretation is to crystalize the parties' objectively manifested intent, and this may involve interpretation of specific language or terms, explanation of ambiguities, risk allocation, and sometimes the consideration of extrinsic evidence for limited purposes. As stated by the Federal Circuit recently, the "principal objective in deciding what contractual language means is to discern the parties' intent at the time the contract was signed." *Winstar Corp. v. United States*, 64 F.3d 1531, 1540 (Fed.Cir.1995) (emphasis added). Contract interpretation, a question of law properly disposed of on summary judgment, *P.J. Maffei Bldg. Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed.Cir.1984), may be inextricably intertwined with underlying questions of material fact. *Beta Sys., Inc. v. United States*, 838 F.2d 1179, 1183 (Fed.Cir.1988). Although the Federal Circuit normally reviews this court's factual determinations for clear error and contract interpretations based thereon de novo, *C. Sanchez and Son, Inc. v. United States*, 6 F.3d 1539, 1544 (Fed.Cir.1993), summary judgment may only be granted on those issues presenting no questions of material fact. The process of deciding a motion for summary judgment involving issues of contract interpretation seldom lends itself to a linear analysis.

> Courts and boards follow no predetermined, well-defined analytical framework when giving a contract meaning through the interpretive process. One cardinal rule, however, is to seek to ascertain a single

> interpretation of the contract that reflects the parties' intent. This is generally done by using an objective standard to give a contract its legally enforceable meaning.... This process of interpretation is fluid rather than rigid.... If a 'clear' interpretation is found, analysis ends; otherwise, a circuitous evaluation of the other factors may ensue.

JOHN CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 143-44 (3d ed. 1995).

B. Interpretation of the North Carolina Lease Contracts

Before determining whether defendant has breached certain terms of plaintiffs' lease contracts, the court must first attempt to ascertain the exact meaning of the relevant lease terms. If these terms are clear and unambiguous, the court's process of interpretation in order to identify the objectively manifested intent of the parties is less arduous. If, however, the relevant terms are ambiguous, then contract interpretation becomes more complex and the court must use various interpretative tools, which allow the court to carve a path through the thorny entanglements of contract language. *See* CIBINIC & NASH, ADMINISTRATION 143-44 (3d ed. 1995).

1. Objectively Manifested Intent & Plain Meaning

Although the federal government's procurement procedures are carefully governed by statute and regulation, the formation and administration of government contracts are, for the most part, consonant with the principles of common law contracts. *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411, 68 S.Ct. 123, 124-26, 92 L.Ed. 32 (1947) (citing *United States v. Standard Rice Co.*, 323 U.S. 106, 111, 65 S.Ct. 145, 147, 89 L.Ed. 104 (1944)). To the extent

that the Uniform Commercial Code ("U.C.C.") is not inconsistent with federal law, it is also commonly used to provide guidance in determining the rights and liabilities of the parties to a public contract. *See* JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 151 (2d ed. 1986). While Title 41 of the United States Code ("U.S.C.") and Title 48 of the Code of Federal Regulations ("C.F.R.") set forth special procedures and standards unique to contracts involving the government and a private contractor, the vast body of contract law contains universal principles applicable to all contracts, including those covered by the U.S.C. and C.F.R. Such principles provide invaluable guidance in contract interpretation. Contract interpretation is the process through which the objectively manifested intent of the parties as to what exactly they bargained for is determined. RESTATEMENT (SECOND) OF CONTRACTS §§ 200, 201 (1981). Contract interpretation constitutes an objective test; the standard is what a similarly situated reasonably prudent contractor would have understood the contract language to mean, not what the drafter or any other party subjectively intended the contract to mean. *City of Oxnard v. United States*, 851 F.2d 344, 347 (Fed.Cir.1988); *Badgley v. United States*, 31 Fed.Cl. 508, 511 (1994). If the intent of the parties can be discerned from the contract language as a whole and the parties' underlying purposes for entering into the contract, this interpretation will control. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 201, 202 (1981).

The intent of the parties to the leases here at issue may be readily ascertained from the language of Sec. 1 and a careful reading of the contracts as a whole. Such an analysis suggests a plain meaning interpretation. The clause referring to "all other applicable statutes and regulations" makes no mention of future or subsequent legislation which might

affect the lessees' rights and the procedures for submission of POEs. Within that same section, however, the drafters were explicit when they intended to call attention to future or subsequent action. For example, with respect to the applicable regulations, the drafters explained that they meant those regulations "issued pursuant to the statute and in existence upon the Effective Date of this lease" and "regulations issued pursuant to the statute in the future." Unquestionably, the drafters knew how to specify, and thereby expressly put the lessees on notice of, future or subsequent legislation because they did exactly that in connection with future regulations. In other words, the lessor, the government, in its use of the diction it selected in these leases, knew exactly what they wanted to encompass and what they wanted to omit. This supports application of the well-recognized maxim of legal interpretation, expressio unius est exclusio alterius, the expression of one thing is the exclusion of another. "Where certain things are specified in detail in a contract, other [terms] of the same general character relating to the same matter are generally held to be excluded by implication." *Nicholson v. United States*, 29 Fed.Cl. 180, 196 (1993) (citing GROVER C. GRISMORE, PRINCIPLES OF THE LAW OF CONTRACTS § 105, at 164 (1947)); *United Pac. Ins. Co. v. United States*, 204 Ct.Cl. 686, 692, 497 F.2d 1402, 1405 (1974). It is a "well accepted and basic principle [of contract interpretation]" that, wherever possible, contracts must be interpreted to give reasonable meaning to all provisions of the contract; such an interpretation is always preferable to one which collapses parts of the contract into meaningless or superfluous redundancy. *Fortec Constr. v. United States*, 760 F.2d 1288, 1292 (Fed.Cir.1985); *Reliable Bldg. Maint. Co. v. United States*, 31 Fed.Cl. 641, 643 (1994); *Sharpe Refrigeration, Inc. v. United States*, 30 Fed.Cl. 735, 738 (1994). To hold that application of the OBPA was within the objectively manifested intent of the parties to the North Carolina leases,

as defendant suggests, would mean that the provisions in Sec. 1 should be read to include not only all future or subsequent regulations but also statutes. This would render the labored language, "in existence upon the Effective Date of this lease" and "issued pursuant to the statute in the future," unnecessary, ineffective, and confusing. This is precisely the result courts strive to avoid, and in this case, there is neither need nor justification to endorse this interpretation. Indeed, to read this language, as defendant would have the court do, injects ambiguity and confusion where none would otherwise exist.

Moreover, defendant's argument that the leases may be interpreted to include future or subsequent statutes and their related regulations is inconsistent with the underlying purpose of these lease contracts, which was to promote the discovery of new hydrocarbon resources. This underlying purpose provides further support for the interpretation that the parties' agreements covered only existing statutes and related present and future regulations specifically promulgated pursuant to the OCSLA for administering oil and gas exploration. Plaintiffs entered into these oil and gas leases, which are not materially different from many similar leases that had previously been entered into with many oil companies for the opportunity to explore and develop the petroleum resources of the OCS both offshore North Carolina and in other areas. The court's reading of the language of these leases indicates that at the time such leases were executed, none of the parties to these leases anticipated or envisioned the enactment of the OBPA or any similar legislation approximately nine years later.[8] In the early '80s,

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[8] Plaintiffs' contention that because the leases were defectively formed, i.e., with no meeting of the minds, the parties never reached a binding agreement is not persuasive. This contention is essentially a non- issue in this case because the (...continued)

neither the government nor plaintiffs had any inkling that the OBPA would be enacted. The facts show that only after passage of the OBPA did defendant broaden its interpretation of the scope of the lease agreements' conditions. Contract terms should be interpreted without "regard either to the probable intention of the parties contracting, or to the probable changes which they would [have] made in their contract, had they foreseen certain contingencies." WILLIAM W. STORY, A TREATISE ON THE LAW OF CONTRACTS § 639, at 562 (2d ed. 1847).

Defendant's position, that under OCSLA plaintiffs paid consideration for the mere possibility of exploiting limited and uncertain contractual rights is technically correct. Unquestionably, the Secretary, based upon a legitimate and factually supported finding of harm to the environment--i.e., a fair exercise of discretion--may disapprove POEs. However, the lease contracts here at issue cannot be construed to allow for such drastic unilateral interference by the government, through passage of highly restrictive legislation, the OBPA, with the lessees' bargained for rights of exploitation. Moreover, the government's further restriction of the lessees' rights, by simply legislating away the SOI's ability to consider plaintiffs' POEs, is not a right granted to the government, either expressly or impliedly by these leases. Such a broad and totally nullifying right simply cannot be found within the language of the leases. No provision in plaintiffs' leases even alludes to the government's claimed ability to unilaterally modify or circumvent, with impunity, long established and respected POE approval and permit acquisition procedures established

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undisputed evidence shows that each of the parties reached an explicit agreement with the government and that there was mutual assent as to the scope of their respective rights and liabilities.

under OCSLA. Sec. 13 of the leases states only that the government could suspend or cancel the lease agreements as provided by § 5 of the OCSLA but would nonetheless have to pay compensation as required by that Act. Actually, Section 5 of the OCSLA does not discuss suspension of oil and gas leases. However, other portions of that Act provide that the lessor may suspend the leases "if there is a threat of serious, irreparable, or immediate harm or damage to life ... to property ... or to the marine, coastal, or human environment." 43 U.S.C. § 1334(a)(1). The accompanying regulations to the OCSLA confirm this suspension power but state that no such suspension should exceed five years unless it is properly extended. 30 C.F.R. § 250.10.

Accordingly, based upon the plain meaning of the terms of the leases issued in conformity with the OCSLA and all regulations applicable thereto, this court holds that the parties' objectively manifested intent revealed in the above provisions of the leases, precludes finding merit in defendant's interpretation of the leases. In short, the court is convinced that such a significant and external factor, as the OBPA undeniably is--one which would clearly reduce the value and materially alter the structure and framework of plaintiffs' North Carolina lease acquisitions and permit approvals, whether by abating the SOI's authority to consider the same or otherwise--cannot be read into these unambiguous lease terms. Moreover, common sense suggests that no sophisticated oil and gas company with many years of experience in drilling for oil in offshore leased tracts would knowingly agree to pay the huge, up-front considerations here involved for such tenuous and unilaterally interruptable drilling rights. Plaintiffs acted responsibly in their purchase of these leases because the sums of money they paid were for the exclusive right and privilege to drill for, develop, and produce hydrocarbon resources in the leased areas during a specified initial period

if they met the requirements of the OCSLA and its implementing regulations. Clearly, had any legislative embargo to the approval process been in the contemplation of the parties at the time of entry into the leases,[9] common sense leads to the conclusion that plaintiffs' winning competitive bids undeniably would have been less, perhaps significantly less.

2. Other Considerations

Plaintiffs urge this court to consider the weight of certain out of court statements set forth in plaintiffs' volumes of exhibits. Contract interpretation may be aided by other considerations,[10] including an examination of the

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[9] Defendant's legislative actions are inconsistent with the North Carolina leases in that the OBPA evaded the spirit of the bargain by compelling interference with or failure to cooperate in a party's performance. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (1981); U.C.C. §§ 1-201(19), 1-203. In the present case, defendant's obligation and ability to consider and possibly approve plaintiffs' POEs was fundamental to contract formation and performance. The government's enactment of the OBPA was, as plaintiffs contend, designed to politicize and indefinitely stall the DOI's normal procedures for consideration of POEs, thereby effectively barring the parties from performance of their respective duties under the North Carolina leases through a mechanism beyond the bounds of the contracts' terms. While this may, on the one hand, bring into question defendant's implied duty of good faith and fair dealing--though not necessarily by the SOI, which as an agency established by Congress is bound to follow Congressional dictates--this court need not decide that question because of the court's independent findings discussed above.

[10] The court determines that the North Carolina leases are clear and lend themselves to a plain meaning interpretation. Although the terms referring to "future and subsequent regulations" may have required interpretation, this need for construction does not amount to an ambiguity. If, for the sake of argument, the terms of the contract have some degree of ambiguity, any such ambiguity would be latent and the doctrine of (...continued)

contra proferentem, a firmly established doctrine of contract interpretation that places the risk of unfavorable contract interpretation on the party who drafted and proffered the contract provisions in question, would apply. United States v. Seckinger, 397 U.S. 203, 216, 90 S.Ct. 880, 887, 25 L.Ed.2d 224 (1970); United Internat'l, 33 Fed.Cl. at 370; CIBINIC & NASH, ADMINISTRATION 220-21 (3d ed. 1995). Even if the contract provisions here at issue were ambiguous, the interpretation would remain the same. When contract language is ambiguous, "that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds." RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981).

Application of this doctrine is predicated on the requirement that the non- drafter's interpretation be reasonable, *United States v. Turner Constr. Co.*, 819 F.2d 283, 286 (Fed.Cir.1987), and mandates that latent ambiguities be construed against the drafter, the party with the responsibility and opportunity to reduce the agreement to a coherent, unambiguous, written instrument. *See Orange Cove Irrig. Dist. v. United States*, 28 Fed.Cl. 790, 799 (1993); *Gaston & Assocs., Inc. v. United States*, 27 Fed.Cl. 243, 247 (1992). The one exception to the application of contra proferentem is that the non-drafting party must neither have known nor had reason to know of the ambiguity; i.e., regardless of the reasonableness of the non-drafter's interpretation, the ambiguity must not have been glaring or so obvious as to invoke the non-drafter's duty to inquire. *Reliable Bldg.*, 31 Fed.Cl. at 644. Interpretation of ambiguous contract terms against the drafter is even more favored when the government dictated the provisions of the contract. *United States v. Seckinger*, 397 U.S. at 216, 90 S.Ct. at 887 (reasoning that the drafting party, the government, had "vast economic resources and stronger bargaining position in contract negotiations"); *Kiewit Sons' Co. v. United States*, 109 Ct.Cl. 390, 418, 1947 WL 5089 (1947) (stating that "[t]his rule is especially applicable to Government contracts where the contractor has nothing to say as to the provisions."); *see also North Star Alaska Housing Corp. v. United States*, 30 Fed.Cl. 259, 268 (1993).

In this case, the government controlled the terms in these and many similar oil and gas leases. Any textual uncertainty was not immediately identifiable, and thus, did not trigger a duty of (...continued)

circumstances surrounding formation, even though such circumstances may not have been included within the four corners of the instrument itself. There are, however, limits to such considerations. The parol evidence rule, a rule of substantive law rather than evidence, bars the introduction of extrinsic evidence antecedent to or contemporaneous with contract formation for the purpose of adding to, subtracting from, varying, or contradicting the terms of a written contract, which is final, complete, unambiguous, and unaffected by mistake, fraud, or accident. *California Sand & Gravel, Inc. v. United States*, 22 Cl.Ct. 19, 25 (1990). That is, where a contract is explicit and its terms unambiguous, the court is not at liberty to search for its meaning beyond the four corners of the instrument itself, and the use of auxiliary tools of contract interpretation, including extrinsic evidence and post-formation circumstances, is impermissible. *Nicholson*, 29 Fed.Cl. at 193-94; *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 27 Fed.Cl. 275, 290 (1992). Nonetheless, certain extrinsic evidence may be used for the limited purpose of explaining the circumstances affecting a contract by shedding light on the parties' objective intent. *Kmart Corp. v. United States*, 31 Fed.Cl. 677, 681 (1994). However, contract interpretation, with or without extrinsic evidence, may never be used to discern the unilateral subjective intent of one or more of the parties. *Alaska American Lumber Co. v. United States*, 25 Cl.Ct. 518,

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inquiry by plaintiffs. Application of contra proferentem would require that the provisions of Sec. 1 be construed so as not to include future and subsequent legislation. This conclusion is consistent with the other interpretive tools of contract construction, discussed above, and leads this court to conclude that, although the United States could certainly wield its sovereign power in enacting the OBPA, that act, nonetheless, may not retroactively be applied to the North Carolina leases without regard to and in derogation of plaintiffs' existing rights under the leases.

528 (1992); *see E.I. Du Pont De Nemours and Co. v. United States*, 24 Cl.Ct. 635, 638 (1991). Further, the significance of extrinsic evidence regarding events occurring after contract formation may be considered to determine whether they constitute modifications to the underlying contract. *Walter Dawgie Ski Corp. v. United States*, 30 Fed.Cl. 115, 126 (1993); *California Sand*, 22 Cl.Ct. at 26. Extrinsic evidence, however, must be distinguished from post-formation evidence that is more probative of subsequent events affecting the contract than of contract interpretation. Plaintiffs' voluminous post-lease moratoria exhibits ("PPLMX"), specifically testimony regarding the OBPA's effect on the North Carolina leases, fall into this latter category and do not qualify as extrinsic evidence that may be used for the purpose of contract interpretation.

The statements made by DOI officials regarding the OBPA are of little value in ascertaining the meaning of the contract terms. They amount to neither extrinsic evidence probative of the parties' understood agreement nor contract modifications. Rather, these statements only constitute one form of legislative history. As far as the North Carolina leases are concerned, these statements occurred after the fact, i.e., after contract formation. Testimony by DOI officials to the effect that obstruction of exploration and development of oil and gas offshore North Carolina through enactment of H.R. 3861, the OBPA, "circumvent[s] the nationwide provisions and standards of the OCS Lands Act" provides little support for plaintiffs' interpretation that the OBPA was not within the scope of the contracts at issue. *Review of Offshore Oil and Gas Programs & Laws, Oversight Hearings on H.R. 3861 Before the Subcommittee on Water, Power, and Offshore Energy Resources of the H.R. Committee on Interior & Insular Affairs*, 101st Cong., 2d Sess. 56 (1990) (testimony of Edward Cassidy, Deputy Director, Mineral Mgmt. Serv., DOI). Moreover, the statements of DOI

officials to the effect that "once you issue a lease and then if the government doesn't want to drill there, you find reasons why not, then you have a 'taking' and you've got to buy it back" do not conclusively establish that the bargain struck by the parties did not include a government safety valve through which subsequent legislation could flow, effectively barring oil and gas exploration offshore North Carolina. *DOI & Related Agencies Appropriations for 1990, Hearings Before the Subcommittee on the DOI & Related Agencies of the H.R. Committee on Appropriations, House Appropriations Hearings*, 101st Cong., 1st Sess. 379 (1989) (statement of Manuel Lujan, Jr., SOI, DOI).[11]

To some extent, this court can accept plaintiffs' interpretations of the DOI officials' statements regarding the OCSLA leasing program and the effect of the OBPA thereon. Further, it is logical to conclude, as the court has discussed, that subsequent legislation that binds the key agency

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[11] With regard to the Florida and Alaska leases, Secretary Hodel of the DOI stated that exploration "moratoria" would "deny the rights of an oil and gas lease," take away the "contractual integrity" of the leases, and might constitute "act[s] of bad faith on the part of the Federal Government." PPLMX # 10. Secretary Lujan of the DOI observed that such moratoria would be "breaking faith" with the lessees. PPLMX # 21 at 379. Assistant SOI Griles stated that lease restrictions were "inconsistent with the rights of the lessees under their leases" and could constitute "bad faith on the part of the United States." PPLMX # 76 at 16, 35-36. Similarly, Assistant SOI O'Neal stated that the OBPA was "inconsistent with the terms of the leases" and "put the good faith of the Federal Government in question when post-lease restrictions are imposed on existing leases." PPLMX # 77 at 19, 44-46, 56, 87. The moratoria then at issue included the October 1988 Southwest Florida Leases Appropriations Ban, the October 1989 Bristol Bay Leases Appropriations Ban, the June 1990 Presidential "Off Limits" Decree affecting the Southwest Florida Leases, and the August 1990 enactment of the OBPA resulting in the instant litigation.

official's previously existing power to perform under a government contract may amount to a material breach of contract. The court cannot completely ignore the fact that these statements, uttered by high-level agency officials contemporaneous with passage of the OBPA, generally support plaintiffs' interpretation of the leases vis a vis the OBPA. Nevertheless, these statements, which are in the nature of admissions against interest, were made during the OBPA (H.R. 3861) hearing process and may reflect, arguendo, only a small cross-section of the DOI and Congressional membership, do not unambiguously explain the proper interpretation of the North Carolina lease terms. In any event, caution must be exercised when referring to statements found in the legislative history, whether they are made by legislators or lobbyists, to glean the intent of Congress vis a vis legislation. *Thompson v. Thompson*, 484 U.S. 174, 191-92, 108 S.Ct. 513, 522, 98 L.Ed.2d 512 (1988) (Scalia, J., concurring); *Piper v. Chris-Craft Indus. Inc.*, 430 U.S. 1, 26, 97 S.Ct. 926, 941, 51 L.Ed.2d 124 (1977). Even greater caution must be used, then, when referring to such evidence to interpret the terms of contracts that were formed many years before the enactment of subsequent legislation, whether or not such legislation has apparent impact upon such contracts.

II. Breach of Contract

A. The Contracts at Issue

To determine the merits of plaintiffs' claims for breach of contract, the court turns to the lease agreements in question, relying on the meaning ascertained through contract interpretation.[12] Under the lease agreements, plaintiffs paid

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[12] Although plaintiffs briefly argue that recovery be predicated on the doctrines of impracticability of performance and frustration of purpose, respectively, the case at (...continued)

large sums of money for the "exclusive right and privilege to drill for, develop, and produce oil and gas resources...." The leases, however, are subject to the OCSLA and regulations issued pursuant to it, and, as defendant points out, do not guarantee that plaintiffs will be able to explore and develop the lease areas. Under the existing regulations, plaintiffs must obtain numerous federal and state approvals and certifications before they may explore and ultimately develop the leased areas. However, it is plaintiffs' inability to take part in this regulatory process as a result of the OBPA's restriction on the SOI's approval powers that is at the heart of their claim. Plaintiffs do not claim that defendant is in breach because it has not approved an exploration plan. Rather, they claim defendant is in breach because it cannot and will not even consider an exploration plan--a necessary step in the regulatory approval process. They argue that even if the leases do not clearly state on their face defendant's obligations regarding actual approval of exploration plans, there can be no doubt that defendant is contractually obligated at least to consider them. The court agrees.

The lease agreements do not specifically state the parties' obligations regarding exploration plans but provide that the lessees agree to "comply with all regulations and orders relating to exploration." Under the OCSLA and its

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bar does not turn on these theories of risk allocation and excuse of performance. Impracticability applies in scenarios where performance becomes unduly and exceptionally burdensome due to some usually unforeseeable change of circumstances. Frustration applies where unforeseen supervening events, the non-occurrence of which was a basic assumption to the venture, deprives a party of all contractual benefit and utterly defeats the purpose of performance, although there is no actual impediment to performance. The court finds it unnecessary to decide whether these theories of risk allocation lie in light of its breach of contract analysis.

regulations, exploration may only be conducted pursuant to approved exploration plans. Thus, in order to explore, plaintiffs are obligated to prepare and submit exploration plans. The necessary reciprocal obligation is that the government will timely and fairly consider--not necessarily approve, but at least promptly consider--exploration plans properly submitted. Indeed, the OCSLA mandates that the Secretary "shall approve" exploration plans within thirty days unless determined that the plan "would probably cause serious harm or damage" and the plan could not be modified to avoid such harm. 43 U.S.C. § 1340(c)(1). If, as defendant contends, the government were under no obligation to consider facially compliant explorations plans, plaintiffs' purchases would have been an empty one. It is undisputed that obtaining an approved POE is necessary to plaintiffs' exploitation of their leases. Given the past course of dealing between petroleum companies and the DOI pursuant to earlier leases granted under the OCSLA, it seems apparent that plaintiffs would not have paid millions of dollars in bonuses and rents, if defendant's interpretation of the lease agreements is correct. As already noted, under the lease agreements, defendant was contractually obligated to consider facially compliant POEs promptly and fairly. Any contrary interpretation would render the bargain illusory and subject to unilateral forfeiture. Clearly, the OBPA imposed severe, burdensome, new conditions upon the DOI's obligation under OCSLA to approve POEs offshore North Carolina, which were not contemplated by the parties when the leases were executed. Therefore, the court also finds that compliance with the OBPA compelled governmental breach by non-performance accompanied by an anticipatory repudiation thereby giving rise to "total breach."

Defendant relies heavily upon the Supreme Court's explanation of the OCS leasing process in *Secretary of Interior v. California*, 464 U.S. 312, 104 S.Ct. 656, 78

L.Ed.2d 496 (1984), to argue it was not at all contractually obligated to act on submitted exploration plans. When discussing OCS leases similar to the ones at issue in this case, the Court in California noted that:

> OCS lease sales are conducted by the [DOI]. Oil and gas companies submit bids, and the high bidders receive priority in the eventual exploration for and development of oil and gas resources situated in the submerged lands of the OCS. A lessee does not, however, acquire an immediate or absolute right to explore for, develop, or produce oil or gas on the OCS; those activities require separate, subsequent federal authorization.

464 U.S. at 317, 104 S.Ct. at 659. But it is the Court's further characterization of the lessees' rights under the leases that defendant cites to show that plaintiffs do not have the rights they assert. The Court stated that OCS lessees receive only "priority over other interested parties in submitting for federal approval a plan for exploration, production, or development." 464 U.S. at 337, 104 S.Ct. at 669. This is, of course, true, and plaintiffs do not contest this. However, it does not follow that the government may then short circuit the entire regulatory process by retracting the SOI's powers to consider submitted plans of lessees whatever their status vis a vis other potential lessees. It is here that plaintiffs' and defendant's interpretations part, for defendant refuses to recognize that the reciprocal rights granted to the parties under the contracts at issue provide that submission of plaintiffs' POEs is predicated on an unequivocal governmental duty to timely and fairly consider, though not necessarily approve, them. The power of approval is, as noted, the SOI's. *See* 43 U.S.C. § 1340(c)(1).

Having found the government contractually obligated to, at the very least, timely and fairly consider plaintiffs' POEs,

it is an inescapable conclusion that defendant's failure to do so constitutes a breach. Defendant does not dispute that as a result of the OBPA, it cannot consider plaintiffs' POEs under the North Carolina leases. Since defendant is now legislatively barred from performing, it is in breach. It is not necessary for plaintiffs to have actually submitted such exploration plans because it is clear defendant cannot and will not perform its end of the bargain as required by the OCSLA.

Defendant makes many counter-arguments as to why it is not in breach. None of these arguments directly address the central aspect of its breach. Defendant's strongest response is that it is not in breach because its obligation to consider POEs has not come due. Defendant argues that it has suspended the leases, action defendant claims is allowed by the leases themselves, and concomitantly extended the lease terms so it does not have to consider any POEs. In this respect defendant argues, the regulations to which the leases are subject allow the defendant to suspend the leases. Because the leases have been suspended all obligations under the leases, i.e., paying rent and considering exploration plans, have likewise been suspended. Thus, defendant argues that because its obligations under the leases have also been suspended, it is not in breach. Plaintiffs do not challenge the government's authority or ability to suspend the leases but argue convincingly that, in this case, the suspensions were not effected in accordance with the applicable lease terms.

Of course, if the leases had actually authorized the suspensions here imposed, defendant would not be in breach. In that case, plaintiffs' rights to have POEs considered would likewise be suspended. That, however, is far from the case. The leases contain a provision relating to suspending the leases, according to which "[t]he Lessor may suspend or cancel this lease pursuant to Section 5 of the [OCSLA] and compensation shall be paid when provided by the Act."

Perhaps more importantly, the leases indicate that they are subject to the OCSLA, all regulations promulgated thereunder, and all applicable statutes then-existing, which this court has determined does not include subsequently enacted legislation such as the OBPA. Thus, the extent to which the suspensions were proper under the terms of the lease contracts depends on whether such suspensions occurred pursuant to the OCSLA and its regulations. Plaintiffs argue that the denial of their rights under the leases cannot be justified by defendant's authority under the OCSLA and its regulations, because the OCSLA contemplates only "suspension" or "temporary prohibition," not open-ended, indefinite bars. Further, plaintiffs contend that, in any event, suspensions are justified only under defined circumstances, for example, if there is a threat of serious irreparable, or immediate harm. Plaintiffs argue that the facts show that the government, quite to the contrary, unilaterally suspended the leases not because of any such threat of harm, but rather because of the OBPA.

Under the OCSLA the Secretary can establish regulations:

> (1) for the suspension or temporary prohibition of any operation or activity, including production, pursuant to any lease ... if there is a threat of serious irreparable, or immediate harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), or to the marine, coastal, or human environment....

43 U.S.C. § 1334(a) (emphasis added). The Secretary set forth regulations concerning suspension of the leases at 30 C.F.R. § 250.10, which sets out the situations under which the OCS leases may be suspended. Defendant attempts to justify its suspension actions under these regulations.

Section 250.10(a) authorizes suspensions when additional time is needed for such things as facilitating proper development of leases, constructing transportation facilities, entering into sales contracts, and unforeseen delays due to such things as weather. Under 30 C.F.R. § 250.10(b), suspensions are authorized for such reasons as the lessee's failure to comply with provisions of law or the lease, in the interest of national security, conducting an environmental study and threat of serious, irreparable, or immediate harm or damage. Finally, suspensions under this section should not exceed five years.

The suspension notices sent to plaintiffs invoke defendant's suspension powers under 30 C.F.R. § 250.10 but state that the suspension is necessary in order to comply with the OBPA. The notices do not point to any environmental threats, risks of harm to life or the environment, or any other justification set forth in the regulations and the OCSLA. Indeed, the June 1990 Environmental Report, "the most extensive and intensive environmental examination that had ever been afforded an exploration well in the OCS program," determined that the proposed exploration would not result in any significant impact on the Outer Banks marine environment. Defendant now argues that, while not stated in the suspension notices, the leases were suspended to conduct further environmental studies as is authorized under § 250.10(b)(4).[13] However, such post hoc rationalizations

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[13] 30 C.F.R. § 250.10(b) provides:

> ... suspension of any operation or activity, including production, because of the following:
>
> * * * * * *
>
> (4) The suspension is necessary for the implementation of the requirements of the

(...continued)

must be viewed critically. *Sun Oil Co. v. United States*, 215 Ct.Cl. 716, 765, 572 F.2d 786, 815 (1978) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420, 91 S.Ct. 814, 825, 28 L.Ed.2d 136 (1971)). Defendant further argues that the lease suspensions must have been consistent with the terms of the lease contracts because plaintiffs themselves have "stipulated that the 'person who executed [the] suspension order[s] [subsequent to enactment of the OBPA] on behalf of the United States possessed authority to do so." Df.'s Motion for Summary Judgment at 44. This argument is unpersuasive. Merely because it is within an official's authority to take certain action is entirely a separate issue from whether such action was properly taken. The real issue is whether the Secretary's suspension of the leases pursuant to the OBPA breached the contracts, not whether it can be justified retroactively. *See Gulf Oil Corp. v. Morton*, 493 F.2d 141, 146 (9th Cir.1973); *Union Oil Co. v. Morton*, 512 F.2d 743, 747-49 (9th Cir.1975).

The court agrees with plaintiffs that the reasons given for the suspensions were not the type contemplated by the OCSLA, and thus were neither agreed upon by plaintiffs nor incorporated into the bargain at the time of contract formation. The suspension notices state that the leases were suspended in order to comply with the OBPA. The OCSLA, however, already provided a detailed and comprehensive framework of regulatory procedures for the OCS oil and gas leasing program. The OCSLA provides that if the SOI determines that exploration plans were consistent with the OCSLA's environmental guidelines, he "shall approve" them. If not, i.e., if the plans are likely to cause serious injury to life, property, or the environment, then he shall reject them.

National Environmental Policy Act or to conduct an environmental analysis[.]

43 U.S.C. § 1340(c)(1). The OCSLA provides a coherent scheme for the OCS program, and it was that scheme only around which the parties formed their contracts. In signing the leases, plaintiffs agreed to subject themselves to the OCSLA and the regulatory scheme surrounding it, but they could not have envisioned themselves being bound by the OBPA. Plaintiffs were aware that only in certain circumstances (for example, in case of a threat of serious harm)[14] could their leases be suspended or cancelled. Indeed, in certain instances plaintiffs themselves might have requested such action. What they did not agree to, however, was that the leases could be unilaterally suspended indefinitely through a mechanism beyond the scope of the OCSLA. The parties did not contemplate at the time of formation that the leases could be suspended because, some nine years later, Congress would want to promote new policies on enhanced environmental protection by, among other actions, halting development of the OCS offshore North Carolina. This was within neither the words nor the

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[14] The regulations prescribed by the Secretary under this subsection shall include, but not be limited to, provisions--

> (1) for the suspension or temporary prohibition of any operation or activity, including production, pursuant to any lease or permit (A) at the request of a lessee, in the national interest, to facilitate proper development of a lease or to allow for the construction or negotiation for use of transportation facilities, or (B) if there is a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), or to the marine, coastal, or human environment, and for the extension of any permit or lease affected by suspension or prohibition under clause (A) or (B) by a period equivalent to the period of such suspension or prohibition ...

43 U.S.C. § 1334(a) (emphasis added).

spirit of the lease agreements. Thus, the court finds that defendant's actions are not justified as mere lawful, authorized suspensions of the leases but material breaches of the lease contracts.

Further evidence that the suspensions were not the type bargained for in the leases is the duration of the suspensions. Section 250.10(e) provides that the suspensions should not exceed five years. Except under limited circumstances, OCSLA establishes that leases must be suspended for five years before they may be cancelled. That the OCSLA provides a mechanism to cancel leases after a prolonged suspension period demonstrates that it only intended suspension be of a limited duration. Significantly, many of the suspension notices directed plaintiffs to this section of the OCSLA stating that the leases must be suspended for a period of five years before cancellation. The OCSLA contemplated that suspensions would be of a limited nature and not indefinite bars to exploration. The court in Union Oil, construing similar OCS leases, likewise found that a suspension "by definition possesses a 'temporary nature.' " 512 F.2d at 750. Continuing, that court acknowledged the SOI's broad suspension powers for conservation of natural resources but found, "Congress clearly did not intend to grant leases so tenuous in nature that the Secretary could terminate them, in whole or in part, at will." *Id.*

Defendant's counsel admitted during oral arguments that defendant has no idea how long these suspensions will continue, that there is no evidence that the suspensions will be lifted anytime in the future, and that the United States is not waiting for the completion of any studies or the results of any tests or any additional information before acting on the suspensions. The suspension in Gulf Oil thus differs from those in the case at bar because the latter were not prompted by the SOI's imminent concerns about risks to the marine ecosystem. *See* 493 F.2d at 144-45. It seems clear that the

leases neither provide for nor even implicitly contemplate the type of open- ended, indefinite suspensions present in this case. The government's reliance on the Secretary's limited suspension powers to avoid breach of contract, therefore, is misguided and misplaced.

Plaintiffs have convinced the court that under the leases they were entitled to fair consideration of their POE's, the essential first step to exploitation of their leases. The court completely agrees with plaintiffs' interpretation of the leases that there can be no doubt that the lessor is contractually obligated to consider and act on POEs submitted by lessees regardless of the fact that the defendant's obligations are not stated definitively by express language in the leases. Again, as plaintiffs argue, an "interpretation of the leases that would allow the United States as lessor to fail to act on POEs, after requiring large up-front bonuses and lessor approval of POEs, would create an illusory bargain and permit unilateral forfeitures of lease bonuses, putting lessees entirely at the mercy of the United States." For all of the foregoing reasons, the court holds that defendant's failure, under the restrictions adopted pursuant to the OBPA, was a material breach of the leases. Accordingly, plaintiffs are entitled to a monetary recovery in this proceeding.

B. The Impact of Subsequent Legislation on a Government Contract Involving a Highly Regulated Industry

The U.S. Court of Appeals for the Federal Circuit has recently discussed the force and effect of subsequent legislation on the issue of breach of a government contract involving a highly regulated industry. In *Winstar Corp. v. United States*, 64 F.3d 1531 (Fed.Cir.1995), cert. granted, --- U.S. ----, 116 S.Ct. 806, 133 L.Ed.2d 753 (1996), the Federal Circuit confronted some of the same issues presented by the case at bar. Indeed, the parties to this case have taken advantage of every opportunity to bring to this court's

attention the significance, or lack thereof, of the Federal Circuit's decision in *Winstar* to affirm this court's holding in that case. *See* Pl.'s Motion for Leave to File Recent Appellate Opinion, Df.'s Response, Pl.'s Reply, Df.'s Report of the Effects of the Decision in *Winstar*, and Pl.'s Response to Df.'s Report. In short, the Federal Circuit, sitting *en banc*, affirmed this court's decision that the government, by enacting the Financial Institution Reforms, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub.L. No. 101-73, 103 Stat. 183, as codified in relevant part by 12 U.S.C. § 1464 et seq., breached its express and implied contracts with plaintiffs, the Winstar Corporation ("Winstar"), the Statesman Bank ("Statesman") and Glendale Federal Bank ("Glendale"). The Federal Circuit reasoned that where future or subsequent legislation contradicts the intent of the parties to a contract, the United States may be liable for breach under certain circumstances despite the sovereign acts doctrine. Clearly, *Winstar* is apposite. Therefore, the following, more detailed examination of the *Winstar* decision will help explain the resolution of this case.

Winstar presented a case in which financial institutions had formed express and implied contracts with the United States in the highly regulated field of banking. Originally, the plaintiffs, Winstar, Statesman and Glendale, had consolidated their actions in the Court of Federal Claims. This court found that the government had breached its contracts with the plaintiffs by enacting subsequent legislation, the FIRREA. The contracts at issue allowed the financial institutions to take advantage of special accounting treatment in their acquisition of failing thrifts. Specifically, the contracts permitted the plaintiff financial institutions to calculate a special type of goodwill, an intangible asset representing the ability of a business or financial institution to generate income due to business reputation, market position, management, technology, and other elusive

indications of earning power. In the savings and loan ("S & L") industry, "supervisory goodwill" represents the difference between the fair market values of a failing thrift's current assets and its liabilities assumed by the acquirer and is normally amortizable over a straightline basis over a number of years. Under the contracts at issue:

> The Bank Board and the FSLIC [Federal Savings and Loan Insurance Corporation] allowed the merged thrifts to count this supervisory goodwill toward the minimum regulatory capital requirements and to amortize this goodwill over periods of up to 40 years. This permitted the healthy thrift to assume the deposit liabilities of the failing thrift and to have capital compliance without having to put up large amounts of its own money and without requiring large amounts of monetary assistance from the government.

Id. at 1536. In 1989, Congress responded to a financial crisis that had overcome the S & L industry by enacting the FIRREA, which significantly impacted the regulatory scheme of thrift mergers and acquisitions.

> As pertinent here, it (1) abolished the FSLIC and transferred its functions to other agencies; (2) created a new thrift deposit insurance fund under the Federal Deposit Insurance Corporation ("FDIC"); (3) eliminated the Bank Board and replaced it with the Office of Thrift Supervision ("OTS"), an office within the Department of the Treasury and made the OTS Director responsible for the regulation of all federally insured savings associations and the chartering of federal thrifts; and (4)

> established the Resolution Trust Corporation ("RTC"), which was charged with closing certain thrifts. *See* 12 U.S.C. §§ 1437 note, 1441a, 1821.

Id. at 1538 More significantly, the FIRREA "greatly reduced the amount of supervisory goodwill that could be used to meet regulatory capital requirements." *Id.* at 1544-45 (citing 12 U.S.C. § 1464(t)).

The plaintiffs filed suit in this court alleging that the government was liable for breach of contract and an unconstitutional taking without just compensation in violation of the Fifth Amendment by restricting the availability of supervisory goodwill and capital credits to satisfy the regulatory capital requirements of the plaintiffs as previously allowed prior to the enactment of the FIRREA. *Id.* at 1539. In its defense, the government argued that plaintiffs did not have the contractual rights they alleged. More importantly, defendant, relying heavily on *Bowen v. Public Agencies Opposed to Social Security Entrapment ("POSSE")*, 477 U.S. 41, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986), challenged plaintiffs' claims by arguing that "the alleged agreements were subject to [subsequent] statutory and regulatory challenges." *Winstar*, 64 F.3d at 1539. POSSE states that " 'sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms.' ... Therefore, contractual arrangements, including those to which a sovereign itself is a party, 'remain subject to subsequent legislation.' " POSSE, 477 U.S. at 52, 106 S.Ct. at 2392 (quoting Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 147-48, 102 S.Ct. 894, 907, 71 L.Ed.2d 21 (1982)). In support of its position, the government cited a clause in the contract reading, "Nothing in this Agreement shall require any unlawful action or inaction by either of the parties

hereto." *Winstar*, 64 F.3d at 1542. Defendant argued that the Winstar plaintiffs "impermissibly sought to enjoin Congress' power to legislate and the agencies' power to regulate."[15] *Id.* The Federal Circuit disposed of these arguments by reasoning that the government's POSSE arguments " 'mischaracterized the plaintiffs' claim as one which improperly seeks to bind the government's power to regulate.' Rather, the [U.S. Court of Federal Claims] noted that plaintiffs sought only money damages, which did not implicate the government's power to regulate." *Id.* at 1545-46 (citing this court's decision with approval).

The breach of contract issues presented by the case at bar bear striking similarities to those addressed by the Federal Circuit in *Winstar*. Specifically, to what extent can the government be held liable for breach of contract when the alleged breach stems from subsequent legislation or regulation, which clashes with the terms of a public contract in a highly regulated industry or the objectively manifested intent of the parties thereto in a highly regulated industry? Although the Federal Circuit in *Winstar* did not venture to set forth a precise test, it did consider factors that help clarify whether subsequent legislation may give rise to governmental liability for breach of contract. First, the parties' objective intent, to the extent it can be crystallized from the contract terms reduced to writing, is probative of the force and effect of subsequent laws. Second, the presence of an integration clause strongly suggests that the contract was the sole embodiment of the bargain. A non-integration clause, or a clause referring to terms not found in the contract

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[15] The government also asserted the sovereign acts doctrine and the unmistakability doctrine as defenses, claiming that they precluded any recovery by plaintiffs for governmental breach of contract. *Winstar*, 64 F.3d at 1539. These doctrines are discussed *infra* at III. Other Defenses.

document, therefore, is evidence that the agreement is subject to external conditions or requirements, whether statutory, regulatory, or otherwise. Third, if the contract on its face would subject one or more of the parties to "regulatory noncompliance and penalties" when read in light of the subsequent governmental action in question, it would defy reason to hold the agreement subject to such an outright restriction. Finally, the Federal Circuit reasoned that a prior agreement, when contradicted by subsequent legislation, does not constitute a mere statement of "then-current prosecutorial and regulatory policy" once the parties have become bound by specific terms through mutual assent. *Id.* at 1541-42.

In this case, the first of these considerations supports plaintiffs' position that the subsequent legislation here at issue, the OBPA, violates the North Carolina leases. The objective intent of the parties seems clear--plaintiffs paid the oil and gas lease bonuses and rental payments in consideration for at least the opportunity to explore and develop the OCS. As plaintiffs point out, no one would pay such an exorbitant premium for interests that could potentially be rendered worthless, and that is in effect what the OBPA accomplishes by prohibiting the approval of any exploration, development, or production plans, nor any application for permit to drill until the later of October 1, 1991, or 45 days of continuous Congressional session following "submission of a written report to the Congress by the Secretary of the Interior, made after consideration of the findings and recommendations of the Environmental Sciences Review Panel." 33 U.S.C. § 2753(c)(1). To the extent the parties' intent sheds light on the applicability of subsequent legislation, it is most doubtful that they intended that the North Carolina leases be governed by future or subsequent legislation such as the OBPA, which was enacted approximately seven years after the last disputed contract was formed.

The second *Winstar* consideration, the inclusion and scope of an integration or non-integration clause, may shed light in the case at bar on whether the disputed bargain was struck subject to future or subsequent legislation. *See* 64 F.3d at 1541. On the one hand, the North Carolina lease agreements contain a provision in Sec. 1, which reads that the lease agreements were issued pursuant to the OCSLA of August 7, 1953, and subject to: "[that] Act; all regulations issued pursuant to the statute and in existence upon the Effective Date of this lease; all regulations issued pursuant to the statute in the future ... and all other applicable statutes and regulations." SXs 128-180, Sec. 2 (emphasis added). This provision may not be read as an integration or nonintegration clause, but rather as a provision incorporating other terms by reference. This, however, does not necessarily mean that the contracts are subject to all subsequent statutes and regulations. Legislative acts that lie beyond the scope of this clause still may not alter, vary, or contradict the terms of the North Carolina lease agreements. The key to the linchpin, then, is to determine which legislative acts fall within the scope of Sec. 1. Through contract interpretation, this court has determined that future, subsequent statutes were not contemplated by the North Carolina lease agreements, much less statutes that suspended the leases through means beyond the scope of Sec. 13 of the contracts. Had the parties intended this to be the case, the government could have made this clear in drafting Sec. 1 of the leases. Despite the government's claims that the OBPA has retroactive effect, plaintiffs, in performing under the contracts at issue, were not "contractually bound" to comply with the OBPA. *See* 64 F.3d at 1541. Ultimately, while the second *Winstar* consideration is somewhat illuminative on the issue of breach, it does not provide conclusive support for either parties' motion.

The third consideration discussed in *Winstar* deals with regulatory noncompliance and penalties. That is, if a party to a contract would be subject to penalties for regulatory noncompliance but for the availability of certain special treatment accorded by the contract, then it is probable that subsequent legislation that eliminates such exceptional treatment is ineffective against those contractually bound parties. 64 F.3d at 1542. In this case, plaintiffs faced no such risk, except to the extent that any party attempting to explore and develop oil and gas resources on the OCS without a valid permit would be subject to applicable regulatory sanctions. As in *Winstar*, plaintiffs in the present case acquired their unique business opportunities solely as a result of contract formation. In both cases, subsequent legislation sought to deprive plaintiffs of a substantial portion of those opportunities. In this case, the legislation was narrowly tailored to target the specific contracts and sought to abate the accompanying rights here at issue.

Finally, the Federal Circuit in *Winstar* considered whether rights vested through contract formation can be overridden by future or subsequent legislation or regulation when the understood terms of the agreement amount to no more than a manifestation of "then-current prosecutorial and regulatory policy." *Winstar*, 64 F.3d at 1542. That court reasoned that the government's argument that contract terms bestowing special treatment upon parties may be disregarded as a mere statement of policy was of no moment.

> Once specific terms as to the [contract terms] were incorporated in a negotiated arm's length contract, both parties were bound to them. While it is true as the government argues that a statement of policy ... could be changed (which it later was), the contract could not be changed except by mutual consent.

Id. In the case at bar, the government does not go so far as to say that the provisions of the OCSLA were mere statements of environmental regulatory policy. Defendant does, however, suggest that where the two acts conflict, enactment of the OBPA supplants the OCSLA and, accordingly, controls the North Carolina leases thereafter. Thus, defendant argues that this court should grant its motion for summary judgment. Defendant's argument is without merit. In fact, granting defendant's motion would deprive both parties of the benefits of their bargain. This court finds that the government's implication that changing policies on environmental regulation, such as the OBPA, can subvert the parties' mutual assent, reduced to writing and memorialized in contract, rings hollow. "When performance of a duty under a contract is due any non- performance is a breach." RESTATEMENT (SECOND) OF CONTRACTS § 235(b) (1981), cited *inter alia* by *Winstar*, 64 F.3d at 1545. This court finds that defendant breached the North Carolina lease agreements by enacting the OBPA and subsequently implementing its provisions in derogation of plaintiffs' rights under those agreements.

III. Other Defenses

As a defense to plaintiffs' claims of breach of contract, the government contends that the sovereign acts doctrine shields it from liability. It is a well-settled point of law that the sovereign acts defense is included as an inherent term, whether express or implied, in every public contract. *Hughes Communic. Galaxy, Inc. v. United States*, 998 F.2d 953, 958 (Fed.Cir.1993). The sovereign acts doctrine has its genesis in the proposition that the government acts in a dual capacity--as both a contractor and a sovereign--and should not be held liable in contract for acts it performs as a sovereign. *See Jones v. United States*, 1 Ct.Cl. 383, 384-85, 1865 WL 1976 (1865); *Deming v. United States*, 1 Ct.Cl. 190, 191, 1865 WL 2004 (1865). This is necessary to allow

the government to function properly unimpaired. The government, when acting as sovereign for the public welfare, cannot be expected to know, consider, or be held accountable for all of the many contracts it enters into as a contractor for the public welfare. *See Jones*, 1 Ct.Cl. at 384-85. The sovereign acts doctrine, however, is not intended to shield all government actions from liability for breach of contract. If all government actions qualified as sovereign acts, the government would be able to abrogate all of its public contracts without risk of liability for damages. *See United States v. Bostwick*, 94 U.S. 53, 68-69, 24 L.Ed. 65, (1876) (reviewing the decision of the Court of Claims and reasoning that the government contractually assumes responsibility for government acts that contravene its contractual obligations). The distinction between the two types of governmental actions, i.e., government qua sovereign versus government qua contractor, turns on the nature of the actions involved. *Hughes Communic. Galaxy*, 998 F.2d at 958-59 & n. 8.

In order for defendant to assert successfully the sovereign acts doctrine as a defense, the government must demonstrate that the alleged breach constituted an act by the sovereign that was "public and general in nature," not private and contractual. *Horowitz v. United States*, 267 U.S. 458, 460-61, 45 S.Ct. 344, 344-45, 69 L.Ed. 736 (1925); *Orlando Helicopter Airways, Inc. v. Widnall*, 51 F.3d 258, 262 (Fed.Cir.1995) (stating that "[t]he focus of the inquiry is thus the nature of the conduct, not the identity of the government agent responsible."). *In Sun Oil Co. v. United States*, 215 Ct.Cl. 716, 572 F.2d 786 (1978), this court's predecessor determined that the SOI's denials of offshore oil permits did not merit sovereign acts immunity since they "were not actions of public and general applicability, but were actions directed principally and primarily at plaintiffs' contractual right[s]." *Id.* at 768, 572 F.2d at 817. Indeed, governmental acts that directly or intentionally, as opposed to incidentally,

impede specific contracts rather than promote the public interest are not sovereign acts within the meaning of this defense. A fortiori, a governmental act whose effect was specifically designed to obstruct performance is not a sovereign act. *See* CIBINIC & NASH, ADMINISTRATION 367-70 (3d ed. 1995). Perhaps most importantly, the Federal Circuit has recently drawn a fine distinction between those cases in which the sovereign acts doctrine is material and those in which it is not. While "contractual arrangements, including those to which a sovereign itself is a party, 'remain subject to subsequent legislation' by the sovereign," the Federal Circuit agreed with this court in regarding *POSSE* as being inapposite in cases where the sovereign's power to legislate was not at issue and where the plaintiffs sought only damages rather than to bind the sovereign's legislative or regulatory powers. *Winstar*, 64 F.3d at 1545-46 (quoting *POSSE*, 477 U.S. at 52, 106 S.Ct. at 2392). As applied here, plaintiffs do not contend that the government is without legislative power as a sovereign to prohibit lease exploration, but only that its decision to do so through the OBPA gives rise to liability for damages for breach of contract.

The unmistakability doctrine, a corollary to the sovereign acts doctrine, states that the government never surrenders its legislative or regulatory powers unless the legislation authorizing the government to enter into the contracts at issue states otherwise in unmistakable terms. Put another way, the United States may avoid liability for breach of contract for acts it undertakes as a sovereign unless it explicitly agrees to be contractually bound in unmistakable terms. *Hughes Communic.*, 998 F.2d at 958; *see also POSSE*, 477 U.S. at 52, 106 S.Ct. at 2392; *Transohio Sav. Bank v. Director, OTS*, 967 F.2d 598, 618-19 (D.C.Cir.1992). The unmistakability doctrine stands or falls with the sovereign acts doctrine. *Resolution Trust Corp. v. FSLIC*, 34 F.3d 982, 984 (10th Cir.1994). In the case at bar, the government's

disputed act flows from enactment of the OBPA. Defendant argues that the OBPA is a public and general act of the government in its capacity as a lawmaker and, therefore, constitutes a sovereign act. According to defendant, the government was acting in its sovereign capacity to safeguard the environment. In support of this argument, defendant points to the structure of the OCS leasing program. According to defendant, the government, in leasing the OCS, was acting in both its sovereign and proprietary capacities because the OCS leases were specifically subject to the SOI's regulatory authority to preserve the natural resources of the OCS. Defendant thus suggests that laws affecting the environment are sovereign acts, public and general in nature, and that the government never surrendered its sovereign powers or immunity.

It is true that under the OCSLA the Secretary may promulgate regulations to protect the environment and that plaintiffs' leases are subject to those regulations. It is not true, however, that all of the government's actions taken to protect the environment are sovereign acts. The notion that an agency official could simply, through regulation, declare plaintiffs' leases null and void and avoid contract liability by citing environmental concerns was squarely rejected by this court in *Everett Plywood Corp. v. United States*, 227 Ct.Cl. 415, 651 F.2d 723 (1981). In that case, the plaintiff was the successful bidder on a contract with the National Forest Service for the sale of timber. Because of environmental concerns, the government terminated the timber contracts. This court rejected the government's argument that it was acting as a sovereign. 227 Ct.Cl. at 422, 651 F.2d at 728. Similarly, in *Sun Oil Co. v. United States*, 215 Ct.Cl. 716, 572 F.2d 786, (1978), this court rejected the argument that merely expressing a desire to protect the environment turns an action into a "sovereign act." *Sun Oil* involved an OCS lease, similar to the ones at issue, that was also subject to the

SOI's environmental regulations. The court, however, rejected the government's argument that the Secretary's denial of a permit to install an oil platform based on environmental considerations was a sovereign act. 215 Ct.Cl. at 768, 572 F.2d at 817. While the government has broad powers to regulate the environment, its actions are not necessarily sovereign acts merely because they are done in the name of environmental protection.

While the OBPA may have been the result of developing environmental concerns, it was not an act of public, general applicability. Further, the OBPA affected the public welfare incidentally at most. That act was "principally and primarily" enacted to restrict the SOI's ability to act on plaintiffs' POEs, thus binding his hands. The OBPA specifically targeted plaintiffs and prevented them from exercising their lease rights. It was specifically enacted to delay indefinitely plaintiffs' exploration of the OCS offshore North Carolina. *See Freedman v. United States*, 162 Ct.Cl. 390, 402, 320 F.2d 359, 366 (1963) ("The doctrine ... does not relieve the government from liability where it has specially undertaken to perform the very act from which it later seeks to be excused"). As previously explained, plaintiffs in this case do not challenge the government's authority to enact the OBPA. They ask only for the benefit of their bargain or at least to be made whole by recovering the damages resulting from the enactment and enforcement of the OBPA. As in *Winstar*, this court concludes that the United States' sovereign power is not at issue in this case. The OBPA does not constitute a sovereign act. "The terms of a government contract, like any other contract, do not change with the enactment of subsequent legislation absent a specific contractual provision providing for such a change." *Winstar*, 64 F.3d at 1547. The sovereign acts doctrine is no bar to plaintiffs' claims for damages for breach of contract. After carefully considering defendant's arguments, the court

finds that neither the sovereign acts doctrine nor the unmistakability doctrine shields defendant from the liability the United States would otherwise bear for breach of contract. Thus, the court holds that as a result of the OBPA, defendant breached the North Carolina leases through its unilateral actions in suspending plaintiffs' leases, resulting in its failure to give plaintiffs' POEs full and fair consideration.

IV. Fifth Amendment Taking Claims

The Fifth Amendment prohibits the government from taking an interest in private property "for public use without just compensation." This clause is not a grant of power, but rather, a limitation on the exercise of power. Plaintiffs have stated no taking claim as to the North Carolina lease interests in their cross-motions for partial summary judgment. They have, however, failed to respond to defendant's motion for summary judgment on the taking issue. Defendant, citing *Southern Nev. Shell Dealers Assoc. v. Shell Oil Co.*, 725 F.Supp. 1104, 1109 (D.Nev.1989), argues that its motion, therefore, is unopposed and must be granted. RCFC 56(f), which conforms to the corresponding Federal Rule of Civil Procedure ("FRCP") 56(e), states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of such party's pleading, but such party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If such party does not so respond, summary judgment, if appropriate, shall be entered against such party.

(Emphasis added.) *See also Sweats Fashions, Inc.*, 833 F.2d at 1562, 1565. Given the fact-intensive nature of a takings

analysis and the evidence currently before the court, the government has not convinced this court that there are no material issues of fact rendering judgment as a matter of law appropriate. Accordingly, summary judgment on the taking issue cannot be granted at this phase of litigation.

CONCLUSION

After careful consideration of the oral testimony, exhibits, arguments, and the applicable law, the court denies defendant's motion for summary judgment and grants third-party plaintiffs' cross-motion for partial summary judgment on the breach of contract claims. The court denies defendant's motion for summary judgment on the Fifth Amendment taking issue.

With respect to the amount of damages to which the remaining plaintiffs may be entitled for breach of contract, the court will hold a formal status conference to discuss with the parties a schedule for resolution of the issue of the quantification of damages to be awarded.

IT IS SO ORDERED.

/s/ J. Robinson
J. Robinson
United States Judge

April 1, 1996

UNITED STATES COURT OF APPEALS,

FEDERAL CIRCUIT.

MARATHON OIL COMPANY AND MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,

Plaintiffs-Appellees,

v.

UNITED STATES, Defendant-Appellant.

No. 97-5146.

May 13, 1999.

Before NEWMAN, PLAGER, and RADER, Circuit Judges.

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by appellees, and a response thereto having been invited by the court and filed by the appellant,

Upon consideration thereof, it is

ORDERED that the petition for rehearing be granted for the limited purpose of clarifying this court's opinion.

IT IS FURTHER ORDERED that the previous opinion of the court in this appeal is withdrawn. The new opinion accompanies this order.

IT IS FURTHER ORDERED that the suggestion for rehearing *in banc* is declined.

The mandate of the court will issue on May 20, 1999.

Circuit Judge NEWMAN dissents in a separate opinion.

Circuit Judge RICH, Circuit Judge MICHEL, Circuit Judge CLEVENGER, Circuit Judge SCHALL, and Circuit Judge BRYSON did not participate in the vote.

Supreme Court, U.S.
FILED
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Nos. 99-244 and 99-253

In the Supreme Court of the United States

MOBIL OIL EXPLORATION AND PRODUCING SOUTHEAST, INC., PETITIONER

v.

UNITED STATES OF AMERICA

MARATHON OIL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States materially breached or repudiated a federal off-shore oil and gas lease by enacting a statute (since repealed) that could have effected a delay in regulatory approval of exploration operations when petitioners failed, in any event, to achieve other express conditions precedent to their exploration rights under the lease.

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In the Supreme Court of the United States

No. 99-244

MOBIL OIL EXPLORATION AND PRODUCING SOUTHEAST, INC., PETITIONER

v.

UNITED STATES OF AMERICA

No. 99-253

MARATHON OIL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals upon panel rehearing (Pet. App. 1a-21a) is reported at 177 F.3d 1331.[1] The original opinion of the court of appeals that was

[1] Unless otherwise noted the citations in this brief to "Pet. App." are to the appendices of the petition filed in No. 99-244.

subsequently withdrawn (Pet. App. 22a-39a) is reported at 158 F.3d 1253. The opinion of the Court of Federal Claims (Pet. App. 40a-93a) is reported at 35 Fed. Cl. 309.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1999. A petition for rehearing was denied on May 13, 1999 (Pet. App. 94a-95a). The petition for a writ of certiorari in No. 99-244 was filed on August 10, 1999. The petition for a writ of certiorari in No. 99-253 was filed on August 11, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1953, Congress enacted the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.* The Outer Continental Shelf (OCS) is the submerged land beneath navigable waters on the Continental Shelf beginning seaward of the coastal waters within the jurisdiction of the individual States. See 43 U.S.C. 1301(a) and (b), 1331(a). The States assert jurisdiction over the waters and submerged lands within three miles of their coasts. Pursuant to the OCSLA, the federal government asserts jurisdiction over the OCS and ownership of the mineral resources found there. Pet App. 2a; 43 U.S.C. 1332, 1333.

The OCSLA establishes a detailed framework for issuing mineral leases and for the approval of related activities on the OCS. The Secretary of the Interior is authorized to administer the Act's provisions relating to the leasing of the OCS. The Secretary is also directed to promulgate rules and regulations to carry out those provisions, including regulations for the prevention of waste and conservation of the natural resources of the OCS. 43 U.S.C. 1334, 1337 (1994 & Supp. III

1997). The Secretary is required to conduct environmental analyses and to offer OCS leases by competitive bidding. 43 U.S.C. 1337(a) (1994 & Supp. III 1997).

An OCS lease grants the lessee a priority over others to submit plans for exploration, production, or development of oil and gas for the leased portion of the OCS.[2] Before the lessee may actually explore and develop the leased area, however, numerous specified conditions must be satisfied under the leases. In particular, the lessee must obtain mandatory state and federal approvals for the plan of exploration. Pet. App. 3a-4a. The purchase of the lease rights and payment of the lease rental payments do not guarantee the lessee that any of the approvals required for exploring and developing the resources in the OSC will be granted. As this Court explained in *Secretary of the Interior* v. *California*, 464 U.S. 312, 339 (1984):

> Under the plain language of OCSLA, the purchase of a lease entails no right to proceed with full exploration, development, or production * * * ; the lessee acquires only a priority in submitting plans to conduct those activities. If these plans, when ultimately submitted, are disapproved, no further exploration or development is permitted.

For example, in order to proceed with exploration, the lessee must submit a plan of exploration for approval by the Secretary. 43 U.S.C. 1340(b), 1340(c)(1). The Secretary may approve an exploration plan only if he determines that the plan is consistent with the OCSLA, the applicable federal regulations and the

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[2] See *Secretary of the Interior* v. *California*, 464 U.S. 312, 317, 337 (1984); *Tribal Village* v. *Hodel*, 869 F.2d 1185, 1187 (9th Cir. 1988), cert. denied, 493 U.S. 873 (1989).

terms of the lease. 43 U.S.C. 1340(c)(1). The Secretary must disapprove an exploration plan if the proposed activity is likely to cause serious harm or damage to life (including aquatic life), to property, to any mineral, to the national security or defense, or to the marine, coastal, or human environment. *Ibid.*

Under the OCSLA, the lessee also may not engage in any exploration until it has complied with the state-approval requirement of the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. 1456(c)(3)(B). See 43 U.S.C. 1340(c)(2). To satisfy this requirement, the lessee must provide a certification that each activity described in the exploration plan conforms with the coastal zone management program of the affected State. 16 U.S.C. 1456(c)(3)(B); 30 C.F.R. 250.203. If that State objects to the certification, the lessee may appeal to the Secretary of Commerce, who may override the State's objection only upon a finding that the plan is consistent with the objectives of the CZMA or is necessary in the interest of national security. 43 U.S.C. 1340(c)(2); 16 U.S.C. 1456(c)(3)(B)(i)-(iii).

If the lessee's plan of exploration contemplates the discharge of any pollutants into the ocean, the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, further requires the lessee to obtain a National Pollutant Discharge Elimination System (NPDES) permit from the Environmental Protection Agency. 33 U.S.C. 1311(a), 1342(a). An NPDES permit cannot be obtained unless the lessee has first complied with the requirements of the CZMA. 16 U.S.C. 1456(c)(3)(A).

If the lessee's plan for exploratory drilling for oil or gas is approved and proves successful, the lessee must then obtain approval of a development and production plan before pursuing further activity. 43 U.S.C. 1351. These mandatory development and production plans

are also subject to the state approval requirements of the CZMA. See 43 U.S.C. 1351(d).

When environmental harm or injury to the national defense either occurs or is threatened by drilling activity, the OCSLA either permits or requires cancellation of the leases by the Secretary. In that situation, compensation is provided to the lessee under the OCSLA. See 43 U.S.C. 1334(a)(2), 1340(c)(1), 1351(h). Leases may also be canceled for failure to comply with the requirements of the OCSLA or the regulations issued under that statute. See 43 U.S.C. 1334(c) and (d).

2. a. In 1981, the Secretary issued oil and gas leases to petitioners for federal OCS lands located off the coast of North Carolina. Each petitioner holds a one-third interest in the leases. Pet. App. 4a. Petitioners joined with the owners of adjacent OCS leases to form a single exploration unit, known as the Manteo Unit. *Id.* at 4a-5a. In 1989, the Manteo Unit proposed drilling an exploratory well about 45 miles east of Cape Hatteras. In July 1990, the State of North Carolina objected to the proposal and the Manteo Unit failed to obtain the required CZMA certification for their exploration plan. *Ibid.*

b. In August 1990, Congress enacted the Outer Banks Protection Act (OBPA), Pub. L. No. 101-380, § 6003, 104 Stat. 555. The OBPA required the Secretary of the Interior to conduct an environmental analysis before allowing exploration or development of the OCS offshore of North Carolina. OBPA § 6003(c)-(e), 104 Stat. 556-557. Congress was concerned that there was insufficient knowledge of the fish species and of the physical and oceanographic characteristics of that area. OBPA § 6003(b)(1)-(5), 104 Stat. 555. Congress therefore established the Environmental Sciences Review Panel to prepare and submit findings and recom-

mendations to the Secretary (OBPA § 6003(e)(2)(A), 104 Stat. 557):

> (i) assessing the adequacy of available physical oceanographic, ecological, and socioeconomic information in enabling the Secretary to carry out his responsibilities under the [OCSLA] with respect to authorizing [leasing, exploration, and development]; and
>
> (ii) if such available information is not adequate for such purposes, indicating what additional information is required to enable the Secretary to carry out such responsibilities * * *.

The OBPA directed the Secretary not to allow exploration or development on OCS lands offshore of North Carolina until the later of October 1, 1991, or 45 days of continuous session of Congress after the Secretary submitted a written report certifying that, upon consideration of the Review Panel's findings and recommendations, the Secretary possessed sufficient information to carry out his responsibilities under the OCSLA. OBPA § 6003(c)(3), 104 Stat. 556.

In view of the requirements imposed by the OBPA, the Department of the Interior temporarily suspended all development and exploration under the OCS leases offshore of North Carolina on August 18, 1990. At that time, the Department also stayed any obligation of the lessees to pay lease rentals. Pet. App. 6a.

c. On August 20, 1990, Mobil, on behalf of the Manteo Unit, submitted a revised and final plan of exploration to drill one exploratory oil well. Pet. App. 6a. On November 19, 1990, the State of North Carolina formally objected to certification of the exploration plan under the CZMA. The Manteo Unit appealed the

formal objections of the State to the Secretary of Commerce. *Ibid.*

d. In January 1992, the Environmental Sciences Review Panel issued its final report required under the OBPA. In April 1992, the Secretary of the Interior issued a report to Congress certifying that he possessed sufficient information to perform his obligations under the OCSLA for approval of the Manteo Unit proposal. Pet. App. 6a. That certification removed the temporary bar to action on the Manteo Unit exploration plan imposed by the OBPA. *Ibid.* See OBPA § 6003(c)(3), 104 Stat. 556. Petitioners could not proceed with their proposed exploration of the Manteo Unit, however, because of the objection of the State of North Carolina to the Manteo Unit CZMA certification and because an NPDES permit had not been obtained. Pet. App. 6a. See 16 U.S.C. 1456(c)(3)(A) and (B).

The Secretary deferred action on the Manteo Unit exploration plan until the agency could complete two studies recommended by the Environmental Sciences Review Panel. Petitioners sought and were granted further suspensions of the leases contained in the Manteo Unit until the studies were completed and until the appeals by petitioners from the objections of North Carolina to CZMA certification were decided by the Secretary of Commerce. Pet. App. 6a-7a.

e. In September 1994, the Secretary of Commerce rejected the appeal of the Manteo Unit from North Carolina's objections to the exploration plan. The Secretary of Commerce found that the proposed plan of exploration and proposed discharges of drilling wastes for the Manteo Unit were neither "consistent with the objectives of the CZMA nor necessary in the interests of national security." Pet. App. 6a.

In November 1994, after the completion of the two environmental studies, and after the Secretary of Commerce refused to override North Carolina's objections to CZMA certification for the Manteo Unit exploration plan, the Secretary of the Interior lifted the suspension of petitioner's leases. Pet. App. 7a.

f. In 1996, Congress repealed the OBPA. Pub. L. No. 104-134, Tit. I, § 109, 110 Stat. 1321-177. Because the objections of North Carolina to certification of the Manteo Unit exploration plan under the CZMA were upheld by the Secretary of Commerce, however, that exploration plan remains barred to this day.

3. a. Petitioners brought the present action in the Court of Federal Claims claiming that the enactment of the OBPA in 1990 effected a material breach and an anticipatory repudiation of their OCS leases. The trial court awarded summary judgment to petitioners (Pet. App. 40a-93a) and entered a final judgment awarding them "restitution of their up-front [lease] payments" in a total amount exceeding $156 million. *Id.* at 2a. See 99-253 Pet. App. 44a.

b. The court of appeals reversed the judgment of the district court. Pet. App. 1a-16a. The court of appeals held that the lease agreements had not been breached by either party: "[r]ather, Marathon has been unable to obtain the necessary Government approvals that would allow it to go forward with exploration of the lease site, a problem for Marathon that arose in 1989, before the OBPA was enacted, and continued after the OBPA was repealed." *Id.* at 16a. The court rejected petitioners' argument that the OBPA was "a supervening act" that made performance impossible. *Ibid.* The court noted that the "OBPA was not the cause of Marathon's inability to obtain issuance of the required permits and approvals for its proposed oil exploration." *Ibid.* Al-

though the lessees paid a substantial up-front cash bonus and annual rents in exchange for the "exclusive right and privilege to drill for, develop, and produce oil and gas resources" (*id.* at 10a), that right "was expressly conditioned on compliance with a complex fabric of statutory and regulatory provisions, which included involvement by both federal and state agencies. The lessees were both knowledgeable and sophisticated purchasers, and entered into these leases with their legal eyes wide open." *Ibid.*

The court of appeals held, "[w]hatever restraints on secretarial actions were imposed by the OBPA essentially had no effect upon these OCS leases because exploration could not proceed without North Carolina's concurrence in the POE's CZMA consistency certification or the override provided by law." Pet. App. 12a. The court noted that "North Carolina objected from the beginning to the Manteo Unit's proposed exploration as being inconsistent with its coastal zone program under the CZMA * * *; North Carolina maintained [its] * * * objections throughout the time that the moratorium imposed by the OBPA was effective." *Id.* at 12a-13a. The court concluded, "[u]nder the circumstances of this case, to treat Marathon's failure to obtain the necessary approvals and permits for exploratory activity as a breach of contract by the Government would be to eviscerate these salutary protections of the nation's fragile coastal lands and waters." *Id.* at 13a.

The court rejected petitioners' contention that, "even if their leases are subject to state objection over the CZMA consistency certification, the OCSLA provides for cancellation of the leases and restitution in such a situation." Pet. App. 14a. The court explained, "the lessee contracted for the exclusive opportunity to explore in a certain area; the inability of a lessee to ex-

plore, if not attributable to the Government, does not create an entitlement to any refund of the consideration paid to obtain the lease." *Id.* at 15a.[3]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. The broad legal propositions that petitioners purport to frame for review by this Court are not presented in this case. To the contrary, as the court of appeals carefully explained, the decision in this case involves only the straightforward application of the settled precedents of this Court to the particular facts of this case.

a. The court of appeals properly held that, because petitioners failed to comply with the certification requirements of the CZMA, there is no basis for sustaining an award of restitution in this case. As this Court explained in *Secretary of the Interior* v. *California*, 464 U.S. at 340, "the purchase of an OCS lease, standing alone, entails no right to explore for, develop, or produce oil and gas resources on the OCS." Although the leases gave the lessees the "exclusive right and privilege to drill for, develop, and produce oil and gas resources," that right "was expressly conditioned on compliance with a complex fabric of statutory and regulatory provisions, which included involvement by both federal and state agencies." Pet. App. 10a. In particular, both the leases and the OCSLA expressly require

[3] Because the court of appeals reversed the trial court's finding of liability, the court did not address the challenges raised by the government to the manner in which the lower court calculated the award of restitution. Pet. App. 16a.

lessees to satisfy the requirements of the CZMA as a precondition of the right to explore for minerals on the OCS. The failure of petitioners to satisfy those requirements of the statute and the leases precludes their claims in this case. *Ibid.*

As the court of appeals further explained, "[w]hatever restraints on secretarial actions were imposed by the OBPA essentially had no effect upon these OCS leases because exploration could not proceed without North Carolina's concurrence" or without "the override" of the State's objections by the Secretary of Commerce. Pet. App. 12a. As this Court held in *Secretary of the Interior* v. *California*, 464 U.S. at 339, when, as in the present case, the requirement of CZMA certification is not satisfied by the lessee, "no further exploration or development is permitted" under the express, controlling terms of the leases. Because petitioners failed to satisfy this contractual condition precedent to their right to explore under the leases, they lack any basis for asserting a claim for restitution in this case.

In a few narrow contexts, the OCSLA has expressly authorized the cancellation of leases and the payment of restitution to lessees. See 43 U.S.C. 1334(a)(2), (c) and (d), 1340(c)(1), 1351(h)(1) and (2). The statute does not, however, provide for restitution or other compensation when development plans are disapproved because of the objection of a State under the CZMA. 43 U.S.C. 1351(h)(2)(A). When CZMA certification is denied, the lessee's only right is to amend the plan or submit a new one. See 43 U.S.C. 1340(c)(2); 16 U.S.C. 1456(c)(3)(B).

As the court of appeals explained, "North Carolina objected from the beginning to the Manteo Unit's proposed exploration as being inconsistent with its coastal zone program under the CZMA." Pet. App. 11a. Petitioners are "knowledgeable and sophisticated purchas-

ers, and entered into these leases with their legal eyes wide open." *Id.* at 10a. They expressly bore the risk of their failure to obtain approval of their exploration plans under the CZMA. Because petitioners voluntarily assumed that risk, and then failed to satisfy that contractual precondition for exploration, the court of appeals correctly concluded that there is no basis for rescission of the contract or for the award of restitution in this case.

b. The court of appeals also correctly rejected petitioners' contention that the enactment of the OBPA materially breached their leases. Petitioners erroneously assert that the mere fact that the OBPA *could* have delayed approval by the Secretary of the Interior of their plans for exploration of the Manteo Unit constitutes a material breach of the leases that entitles them to restitution. A material breach of a contract, however, is one that goes to the essence of the contract and defeats its object. See, *e.g.*, *Thomas* v. *HUD*, 124 F.3d 1439, 1442 (Fed. Cir. 1997).[4] As the court of appeals explained, wholly without regard to the enactment of the OBPA, petitioners were at no time in a position to obtain the necessary approval of their pro-

[4] The remedy of restitution is available only if a breach is material to the performance of the contract as a whole. See, *e.g.*, *Everett Plywood Corp.* v. *United States*, 512 F.2d 1082, 1093-1094 (Ct. Cl. 1975) (denying a claim for restitution of amounts incurred performing the breached contract because the breach did not defeat the purpose of the contract); *United States* v. *Western Cas. & Sur. Co.*, 498 F.2d 335, 339-340 (9th Cir. 1974) (citing 5 Arthur Linton Corbin, *Corbin on Contracts* § 1104, at 562 (1964), and noting that restitution is available only when the breach goes to the "essence" of the contract); John D. Calamari & Joseph M. Perillo, *Contracts* § 15-3, at 649 (3d ed. 1987); 1 George E. Palmer, *The Law of Restitution* § 4.7, at 427 (1978).

posed exploration plans. Instead, at all times, petitioners were disabled from proceeding with their proposed plan of exploration because North Carolina independently objected to the CZMA certification and the Secretary of Commerce declined to override that objection. Pet. App. 12a. Moreover, although the OBPA has now been repealed, petitioners remain unable to proceed with exploration of the Manteo Unit because of their continuing inability to satisfy the requirements of the CZMA. The court of appeals thus correctly held that no delay to petitioners' exploration plans resulted from the OBPA: "had [the Secretary of the Interior] been free to act, he could not have issued any permits for exploration so long as North Carolina's objections remained in force." *Ibid.*

The enactment (and subsequent repeal) of the OBPA therefore did not effect a material breach of the leases. Pet. App. 12a-13a. In the only other similar case, the court of appeals reached the same conclusion. See *Sun Oil Co.* v. *United States*, 572 F.2d 786, 804-806 (Ct. Cl. 1978) (rejecting a claim for damages for the government's delay of OCS permit approvals where other independent causes supported the same delay).

Petitioners assert that the court of appeals erred in relying on the bar to their exploration plan imposed by the CZMA because they might, theoretically, have engaged in other lease operations if the OBPA had not been in effect. This argument ignores the reality that, whatever other steps petitioners might have attempted to take, they could not have proceeded with exploration and production in the absence of CZMA certification. Moreover, throughout the limited period that the OBPA was in effect, petitioners never proposed any alternative exploration or production plans. Instead, they pursued litigation in the Department of Commerce

and in the federal courts to attempt to compel approval of their existing plan under the CZMA. See Pet. App. 14a n.1.

Even though petitioners failed to pursue alternative exploration plans during the period that the OBPA was in effect, they still remain able to pursue such additional plans if they choose to do so. If such activities are proposed in the future, petitioners will, of course, continue to be subject to the requirements of the CZMA. The OBPA, however, has been repealed and will obviously have no effect on them.

2. Petitioners claim (99-253 Pet. 20) that the decision in this case conflicts with the established principle of contract law that restitution may be awarded when performance is excused by a supervening impossibility. The certification requirement of the CZMA, however, is not an unanticipated "supervening" event. It is instead an express condition precedent that limits petitioners' right of exploration under the leases. The refusal of the State of North Carolina to withdraw its objections to petitioners' exploration plan prevents the plan from proceeding; it is not, however, an unanticipated event rendering performance "impossible" under contract law. See 6 Arthur Linton Corbin, *Corbin on Contracts* § 1327, at 341 (1962) "A promise to induce action or forbearance by a third person involves the act and will of another. That his will turns out to be stubborn does not show that the performance is impossible.").

It is thus petitioners, not the court of appeals, that abandon established principles of contract law. In particular, petitioners err in their purported reliance (99-244 Pet. 13-16) on the Restatement (Second) of Contracts. The Restatement makes clear that the failure of a party to accomplish a condition precedent to its rights under a contract does not constitute a breach by the

other party when, as in this case, the claimant "assumed the risk that he would have to perform in spite of such a failure." See Restatement (Second) of Contracts §§ 239(2), 267(2) (1981). Petitioners unquestionably entered into the leases knowing that their right to proceed with exploration was contingent on obtaining numerous permits and approvals, including certification of their plan under the CZMA. See *Secretary of the Interior* v. *California*, 464 U.S. at 339. Petitioners' failure to comply with those requirements creates no claim for breach against the United States. See *id.* at 339-340.

Any obligation that the government may have had to cooperate in operations under the leases never ripened because petitioners failed to satisfy the requirements of the CZMA. Even if petitioners had obtained CZMA certification, the OBPA did not render performance by either party impossible. At most, it could have caused delay in the ultimate approval of the drilling plan—although, on the facts of this case, in view of the State's objection under the CZMA, it is obvious that the OBPA did not *in fact* cause any such delay. Even the sort of hypothetical delay posited by petitioners would not, in any event, have made performance impossible—it would only have delayed it. Even now, if petitioners were able to propose a plan that was acceptable to the State of North Carolina and thereby obtain the required CZMA certification, petitioners would remain able to proceed with drilling operations, for the leases remain in force and effect to this day.

This case thus does not present the broad questions of contract law posed by petitioners. The fact-bound application of the settled precedents of this Court (and of contract law generally) does not warrant further review.

3. Petitioners err in claiming (99-244 Pet. 11) that the decision of the court of appeals conflicts with the holding of this Court in *United States* v. *Winstar Corp.*, 518 U.S. 839, 895 (1996), that government contracts are ordinarily subject to "the law applicable to contracts between private individuals." Nothing in the decision of the court of appeals departs from that principle. Instead, the court of appeals merely applied well-established contract law principles to the particular facts of this case.

Petitioners also err in asserting (99-244 Pet. 18) that the decision in this case conflicts with *Far West Federal Bank, S.B.* v. *Office of Thrift Supervision*, 119 F.3d 1358 (9th Cir. 1997). In *Far West*, the government encouraged investors to recapitalize a thrift savings institution by granting them regulatory forbearance. Congress thereafter passed a new statute that "completely overhaul[ed] the structure of federal thrift regulation." *Id.* at 1362. The government expressly argued in that case that the new Act "abrogated existing forbearance agreements." *Ibid.* In view of the fact that the agency expressly repudiated its prior forbearance agreements, the court of appeals held that restitution to the investors was an appropriate remedy. *Id.* at 1365.

In the present case, however, unlike in *Far West*, the government has not abrogated its contractual undertakings. To the contrary, petitioners failed to fulfill a precondition to their own contractual rights by failing to obtain CZMA certification for their exploration plan. The initial delay in operations under the leases occurred because of the lack of the required CZMA certification. The delay in operations continues to this very day for that same reason. See Pet. App. 14a n.1. The leases have not been abrogated by the government; indeed, they remain in effect today. The decision in *Far West*

has no application to the manifestly different facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1999

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

1. Mobil's Petition demonstrated that the Federal Circuit's decision contravenes basic contract law principles in holding (1) that North Carolina's consistency objection under the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1456(c)(3), was an independent and supervening "cause" of Mobil's "damages" which destroyed Mobil's right to restitution, and (2) that the 1996 repeal of the Outer Banks Protection Act ("OBPA"), 104 Stat. 484, 555, during the pendency of North Carolina's CZMA objection (but four years after Mobil filed suit) effectively nullified the anticipatory repudiation that arose with the enactment of the OBPA. Because it cannot successfully defend either of these propositions, the Government simply ignores Mobil's arguments. This head-in-the-sand approach cannot obscure either the magnitude of the errors below or their significance for the Outer Continental Shelf ("OCS") leasing program, as well as many others in which the Government collects large front-end bonus payments from private investors. *See* Pet. 20-23.

a. Causation. Mobil's Petition, pp. 12-16, demonstrates that, under this Court's decisions and uniformly acknowledged principles of contract law, a party's right to obtain restitution in response to an anticipatory repudiation is absolute and does not depend upon proof of actual damages or causation. *See Ankeny v. Clark*, 148 U.S. 345, 353 (1893) (holding that it is "invariably true" that "whenever" one party anticipatorily repudiates a contract, the other party has "thereupon" a "right" to rescind and seek restitution); *Restatement (Second) of Contracts* § 373 (1981) (upon a repudiation an injured party is "entitled" to restitution of "any" benefit conferred).

The Government's opposition does not even attempt either to deny Mobil's argument or to distinguish the

authorities upon which it rests. To the contrary, the Government continues to defend the decision below on the ground that North Carolina's CZMA objection was an independent "cause" of Mobil's damages. *See* Opp. 11 (arguing that in view of North Carolina's CZMA objection, the OBPA "essentially had no effect"); Opp. 13 (contending that none of Mobil's losses "resulted from" the OBPA); Opp. 15 (noting that "in view of the State's objection under the CZMA, it is obvious that the OBPA did not in fact cause any … delay"). *See also* Opp. 13, where the Government cites *Sun Oil Co. v. United States*, 572 F.2d 786 (Ct. Cl. 1978), as "rejecting a claim for damages for the government's delay of OCS permit approvals *where other independent causes supported the same delay*." (emphasis added).[1]

The Government's refusal come to grips with Mobil's argument – coupled with its emphasis that the Federal Circuit relied entirely on causation in denying Mobil's claim to restitution – in and of itself shows the argument's merit.

b. Repeal. The Government similarly persists in relying upon the repeal of the OBPA, as if it could cure the anticipatory repudiation that occurred upon the Act's passage. Thus, the Government refers to the "limited period that the OBPA was in effect," Opp. 13, and insists that because the OBPA "has been repealed" it "obviously" has no effect on Mobil, Opp. 14. But, as with causation, the Government

[1] The Government's reliance on *Sun Oil* reveals that it persists in misdescribing and arguing this case if it were about "delay damages." But as Mobil made clear in its rehearing petition in the Federal Circuit and again in its Petition in this Court, this case is not about delay damages. Rather, as stated by the dissenting judge below – and as effectively acknowledged by the majority below in its second opinion, which deleted references to "delay damages" – Mobil "just wants its money back." Pet. App. 17a.

makes no attempt to counter Mobil's argument that the OBPA's repeal in 1996 – four years after Mobil filed suit and a month after the Court of Federal Claims' decision in the case – could not effect a timely and valid retraction of the Government's anticipatory repudiation. As Mobil pointed out in its Petition, a retraction is valid only "if notification … comes to the attention of the injured party before he materially changes his position in reliance on the repudiation." Pet. 17 (quoting *Restatement (Second) of Contracts* § 256 (1981)). "The bringing of a suit by the promisee for the anticipatory breach is one sort of reliance making retraction impossible." *Id.* (quoting 4 Arthur L. Corbin, *Corbin on Contracts* § 980, at 931 (1951)).[2]

2. The Government's attempt to massage the obvious conflict between the Federal Circuit's decision below and the Ninth Circuit's decision in *Far West Federal Bank, S.B. v. OTS*, 119 F.3d 1358 (9th Cir. 1997), and to escape this Court's decision in *United States v. Winstar*, 518 U.S. 839 (1996), is wholly unconvincing.

a. *Far West*. The conflict between the Federal Circuit's decision and the Ninth Circuit's decision in *Far West* (a *Winstar*-like case arising out of Congress's enactment of FIRREA) could hardly be clearer: Here, the Federal Circuit relied on causation to deny restitution for an anticipatory repudiation; in *Far West*, the Ninth Circuit

[2] The Government's suggestion on page 5 of its opposition that North Carolina lodged its CZMA objection to Mobil's Plan of Exploration ("POE") prior to the enactment of the OBPA is misleading. The only "objection" that North Carolina made in July 1990 was a generic objection to Mobil's voluntarily-submitted "proposed" POE – *not* a consistency objection under the CZMA. North Carolina did not object under the CZMA until November 14, 1990, three months *after* the enactment of the OBPA. (A. 313).

expressly found causation irrelevant and, on that basis, awarded restitution for an anticipatory repudiation. Specifically, in words equally applicable here, the Ninth Circuit in *Far West* held that in emphasizing a lack of causation, the Government had "misse[d] the point" of restitution relief:

> At the moment OTS announced its intention to impose FIRREA regulation on Far West, the Government repudiated [its contract]. Following repudiation, the Investors had the *absolute right* to cease their own performance and to obtain rescission and restitution.

Far West, 119 F.3d at 1365 (emphasis added). The Ninth Circuit found "simply no basis in contract law" for the proposition – the same one that is the basis for the Federal Circuit's decision below – that to obtain restitution an injured party "would have to prove that [it] suffered consequential damages." *Id.*

b. *Winstar*. The Government also either misperceives or simply ignores the conflict between the panel majority's opinion and this Court's decision in *Winstar*. As Mobil pointed out in its Petition, the whole point of *Winstar* is that, "when the Federal Government enters into contractual arrangements with private parties, it must play by the same rules as everyone else." Pet. 23 (cataloguing quotations from *Winstar*). The rules governing private-party contracts are clear. According to this Court, the lower federal courts, the state courts, the *Restatement*, and prominent contract law scholars, upon an anticipatory repudiation by one private party to a contract, the other private party has an absolute right – without regard to causation – to rescind and obtain restitution. *See* Pet. 12-16. Under *Winstar*, parties

contracting with the Government possess that same absolute right.

3. Recognizing that established law so fundamentally undermines its position, the Government has resorted to meritless arguments designed to divert the Court's attention from the important issues of law at stake in the case.

a. Contractual Conditions Precedent. In an effort to make it appear that Mobil is at fault in this litigation – and therefore undeserving of restitution – the Government invokes the concept of "contractual conditions precedent." Specifically, it asserts that "[b]ecause petitioners failed to satisfy [a] contractual condition precedent to their right to explore under the leases" – namely, their purported obligation to obtain CZMA approval from North Carolina – "they lack any basis for asserting a claim for restitution in this case." Opp. 11.

Once again, the black letter law condemns the Government's position. As Professor Corbin observed:

> A repudiation or other total breach by one party enables the other to get a judgment for damages or for restitution *without performing acts that would otherwise have been conditions precedent*. It is no longer necessary for the plaintiff to perform or to tender performance.

Corbin, *supra*, § 977, at 920 (emphasis added). Indeed, in *Citizens National Bank v. Davisson*, 229 U.S. 212 (1913), this Court held that "familiar principles" dictate that where one party "repudiate[s] and abandon[s]" a contract, the other party is "absolved ... from any further performance of

conditions precedent on [his] part." *Id.* at 224 (citing *Roehm v. Horst*, 178 U.S. 1, 8, 16 (1900)).[3] The Court of Federal Claims below recognized and applied this "familiar principle[]" when it held that "[i]t is not necessary for plaintiffs [even] to have actually submitted exploration plans" – much less, actually obtained CZMA clearance – "because it is clear defendant cannot and will not perform its end of the bargain as required by OCSLA." Pet. App. 73a.

b. OCS Lands Act § 1351. The Government insinuates that Mobil is not entitled to restitution because the OCS Lands Act ("OCSLA") does not expressly provide such a remedy. Citing 43 U.S.C. § 1351(h)(2)(A), the Government argues that "[t]he statute does not ... provide for restitution or other compensation when development plans are disapproved because of the objection of a State under the CZMA." Opp. 11.

The Government's argument is doubly flawed. First, and most importantly, Mobil has never claimed a right to restitution *under the OCSLA*; rather, it claims a right to restitution *under the common law* that governs federal government contracts, as applied by the courts and as

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[3] Other courts – both state and federal – have likewise acknowledged that an anticipatory repudiation excuses a party from compliance with conditions precedent. *See, e.g., Hidalgo Properties, Inc. v. Wachovia Mortgage Co.*, 617 F.2d 196, 199 (10th Cir. 1980) ("A party is excused from tendering performance of conditions precedent when the other party repudiates the contract."); *Builder's Concrete Co. v. Fred Faubel & Sons, Inc.*, 373 N.E.2d 863, 868 (Ill. Ct. App. 1978) ("When one party to a contract repudiates his contractual duties before time for performance, the other party may elect to treat the contract as ended. In such cases the nonbreaching party is not required to tender performance or to comply with conditions precedent.").

summarized and reported in the *Restatement* and leading treatises. *See* Pet. 12-16.

Second, far from supporting the panel majority's decision, § 1351(h)(2)(A) actually confirms Mobil's common law rights to restitution in this case. Although § 1351 does state that lessees "shall not be entitled to compensation" *under the OCSLA* in the event of a CZMA consistency objection, that provision applies only to oil and gas *plans of development and production* ("PODs"), not to *exploration plans* ("POEs"). The exploration stage of an OCS project – the one at issue in this litigation – is governed by § 1340(c), which, quite unlike § 1351(h), is silent as to compensation where exploration is blocked by a CZMA objection. Congress's decision expressly to address in § 1351 the financial consequences of a CZMA objection at the production stage, when contrasted with its silence in § 1340 with respect to the exploration stage, strongly supports Mobil's common law claim to restitution in this case. *See Hohn v. United States*, 118 S. Ct. 1969, 1977 (1998) ("Where Congress includes particular language in one section of a statute but omits it in another ... it is generally assumed that Congress acts intentionally."); *United State v. Texas*, 507 U.S. 529, 535 (1993) (noting that a clear expression of Congress's intent is necessary "to supplant the existing common law in [the] area").[4]

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[4] The Government's attempted invocation of § 1351 defies the Federal Circuit's decision. Following the Government's lead, the Federal Circuit in its original opinion below relied upon § 1351 in denying Mobil's claim to restitution. *See* Pet. App. 36a-37a. However, in response to Mobil's petition for rehearing pointing out the court's error, the Federal Circuit amended its opinion to remove the mistaken citation to § 1351. *See* Pet. App. 14a.

c. Settled Precedents. The Government asserts that the decision in this case merely requires a "straightforward application" of this Court's "settled precedents." Opp. 10. However, the Government can muster only a single citation to a "precedent[]" of this Court – *Secretary of the Interior v. California*, 464 U.S. 312 (1984). That case does not begin to support the Federal Circuit's radical departure from the universally recognized contract law principle that an injured party has an absolute right to obtain restitution in response to an anticipatory repudiation. Instead, the Court in *California* simply held that a CZMA consistency determination is not required for the Government's sale of OCS oil or gas leases, *see id.* at 315, and acknowledged that exploration must survive CZMA scrutiny, *see id.* at 339, a point no one disputes here. Nothing in *California* – or in any other decision of this Court – suggests that the Government may legislatively repudiate its contractual obligations with impunity.

The Government is correct that "settled precedents" govern this case. But those "precedents" confirm the Federal Circuit's error. The dispositive decision is not *California*, as the Government suggests, but *Ankeny v. Clark*, which upheld a party's absolute "right" to obtain restitution "whenever" another party anticipatorily repudiates a contract.

d. Materiality. The Government seems to suggest (albeit elliptically) that the OBPA did not constitute a "material breach" of Mobil's OCS lease agreements. *See* Opp. 12. Upon inspection, however, the Government's purported materiality argument simply devolves, along with the rest of its brief, into an argument about causation. At bottom, the Government simply recycles and reiterates the misguided refrain that Mobil cannot recover because its losses did not "result[] from" the OBPA but were instead caused by the fact that "North Carolina independently objected to the CZMA certification." Opp. 13.

Moreover, the Government has not disputed that the panel majority never questioned the Court of Federal Claims express "find[ing]" that "the OBPA compelled governmental breach by non-performance accompanied by an anticipatory repudiation thereby giving rise to 'total breach.'" Pet. 12 (quoting Pet. App. 71a). To the contrary, as Mobil pointed out in its Petition, the panel majority actually *agreed with* the Court of Federal Claims' assessment that the OBPA could not be reconciled with the terms of Mobil's leases. *See* Pet. 12 (citing Pet. App. 9a-10a).

Finally, the Government's reliance upon *Thomas v. HUD*, 124 F.3d 1439 (1997), brings to this Court's attention a case that Mobil cited to the Federal Circuit which that court ignored. In that case, Thomas entered into a settlement agreement with HUD under which he agreed to resign two years later in return for the agency's promise not to disclose any information about his personnel record. As his departure date approached, HUD responded to a Department of Justice ("DOJ") inquiry about Thomas, revealing unfavorable information regarding his personnel history.

The Federal Circuit held that HUD had materially breached the settlement agreement and concluded that Thomas was therefore "entitled" to rescind the contract and withdraw his resignation, notwithstanding sworn testimony from DOJ officials that the information they received from HUD about Thomas's employment history "would not influence their view of his employability." *Id.* at 1442. Thus, the Court upheld Thomas's material breach argument and affirmed his right to rescind even though the Government's breach had not "caused" Thomas any specific harm. Any other holding, the court determined, would "permit the agency that willingly entered into such an arrangement to breach it without being held responsible." *Id.* And to allow that, the Federal Circuit quite correctly concluded in words equally applicable to this case, "would be

to condone what would essentially be an empty promise made by the government." *Id.*

CONCLUSION

As its opposition reveals, the Government has failed to come to grips with the legal errors that lie at the heart of the Federal Circuit's decision. The Government has also not provided an explanation that avoids the conflict that the Federal Circuit has created with the decisions of both the Ninth Circuit and this Court. Finally, the Government ignores the wide-ranging implications of the Federal Circuit's decision, which, if allowed to stand, would wreak havoc in fields of government contracting ranging from mineral leasing to timber harvesting to telecommunications licensing and threaten billions of dollars in private investment. For these reasons and for those set forth in Mobil's Petition, the Court should grant the Petition.

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No. 99-244

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UNITED STATES OF AMERICA,

Respondent.

and

No. 99-253

MARATHON OIL COMPANY,

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UNITED STATES OF AMERICA,

Respondent.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

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Thomas C. Hays, *Oil Concerns Criticize Offshore-Curb Plan*, The New York Times, June 28, 1990 at D-7 13

INTEREST OF AMICUS CURIAE

For the second time in this contract dispute between the United States and two private oil companies, Marathon Oil Company and Mobil Oil Exploration & Producing Southeast, Inc. ("Petitioners" or "Lessees"), the American Petroleum Institute ("API") finds it vitally important to appear in order to voice its concerns. Initially, API joined as amicus curiae in the Petitioners' rehearing request before the Federal Circuit below, after the first panel decision revealed a fatal miscomprehension of the Outer Continental Shelf Lands Act ("OCSLA"), through which the nation's offshore mineral leasing program is administered. While the Federal Circuit panel did grant a rehearing, its second decision, from which the petitions for writs of certiorari are now being sought, contained only a superficial correction of the court's damage to ongoing Outer Continental Shelf ("OCS") lease activity. Believing that the law now established by the Federal Circuit decision, if left unmodified by this Court, will permanently harm this nation's OCS leasing program, API respectfully submits this amicus curiae brief in support of the Petitioners' writ applications.[1]

API is a petroleum industry trade organization representing approximately 400 companies engaged in oil and gas exploration and production in the United States. The vast majority of the oil and gas leases on the OCS are held by API member companies, and API members have bid tens of billions of dollars at OCS lease sales. In Amicus

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Curiae's view, the decision by the Federal Circuit so misconstrues basic contractual law governing OCS lease operations that the OCS legal landscape has fundamentally shifted. The import of that decision's flawed contractual analysis will alter the economic risk structure of the OCSLA crafted by Congress after decades of experience and study. API is gravely concerned that this reallocation of economic risk will not only harm the oil and gas exploration and producing industry, but might actually threaten the viability of the entire OCS leasing program.[2] Amicus Curiae respectfully urges the Court to grant review to correct this decision.

STATEMENT OF THE CASE

The case presents a breach of contract claim brought against the United States relating to mineral leases issued to the Petitioners/Lessees by the Minerals Management Service ("MMS") in an area of the Outer Continental Shelf offshore the State of North Carolina. While not questioning the finding of the Court of Federal Claims that the government, through Congressional interference, had materially breached its leases with the Lessees, the Federal Circuit decision voided the lower court's restitution award. The panel majority, with Judge Newman dissenting, found that objections to the Lessees' lease exploration plans raised by the State of North Carolina under the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1451, *et seq.*, essentially annulled all other concerns over the federal government's contractual conduct. In so deciding, the court inflicted critical damage to the law

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[2] The Congress has declared that the OCS is a *"vital national resource reserve . . .* which should be made available for expeditious and orderly development. . . . " 43 U.S.C. § 1332(3) (emphasis added).

governing OCS mineral leases that will have far-ranging and harmful effects on *all* holders of OCS leases. If the Federal Circuit's decision is allowed to stand, any future Congressional action that unlawfully thwarts OCS exploration activity, if worked in tandem with state CZMA opposition, will authorize the federal government to confiscate the entirety of a lessee's investment in its lease – even if the federal government, as lessor, acknowledges that the lessee's exploration plans comply fully with all agency requirements. The damage to the OCS leasing program – the source of 26% of domestic natural gas production, and 20% of domestic oil production – could be severe.

The OCS mineral leases that are the subject of this dispute were issued by the MMS under the authority of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.* OCSLA leases require lessees to pay up-front cash bonuses, followed by periodic lease rental payments, for the tracts they acquire. 43 U.S.C. § 1337. Under the OCSLA statutory scheme, an OCS lessee may thereafter prepare a Plan of Exploration ("POE") as part of the "exploration" stage of lease activity.[3] If recoverable

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[3] As described in a leading treatise on federal oil and gas law, the POE will include:

> a description of the type and sequence of exploratory activities; a description of drilling vessels, platforms, and other structures to be used; the types of geophysical equipment that will be used; the location of each exploratory well planned; an oil spill contingency plan; an air-quality analysis; and other relevant geological and geophysical information. . . .
>
> If drilling affects a state with a federally-approved coastal zone management program, an Environmental Report (Exploration) must also be submitted. . . .

resources are found, the lessee may then submit to the MMS a Plan of Development and Production or "POD" to continue on to the "production" stage.[4] In the course of filing either plan, the OCSLA further stipulates that the OCS lessee will certify that its activities will be consistent with the coastal zone management plan of any affected state that has an approved CZMA program. *See* 43 U.S.C. § 1340(c)(2) (applying CZMA certification requirement to exploration plans); 43 U.S.C. § 1351(h) (applying the requirement to production plans).

For exploration plans, the OCSLA provides that the Secretary of the Interior, who acts through the MMS, "shall approve such plan . . . within thirty days of its submission, except that the Secretary shall disapprove [the] plan" upon determining that (i) a proposed activity would result in a condition under 43 U.S.C. § 1334(a)(2)(A)(i) (which sets forth conditions for lease cancellation based on probable harm to life, property, or the environment) and (ii) the proposed activity cannot be modified to avoid such conditions. If the MMS disapproves an exploration plan for those specified reasons, the OCSLA expressly provides that the Secretary may

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PATRICK H. MARTIN, *Outer Continental Shelf Leases and Operating Regulations, in* 2 LAW OF FEDERAL OIL AND GAS LEASES, 25-1, 25-36 (Rocky Mountain Mineral Law Foundation 1999). *See also* 30 C.F.R. § 250.203.

[4] The POD "includes information similar to that in the exploration plan: the specific work to be performed; a description of drilling vessels, platforms, and pipelines together with safety and pollution control features and labor, material, and energy requirements; well locations; current interpretations of all relevant geological and geophysical data; environmental safeguards and safety standards; and a time schedule of the activities to be undertaken." *See* MARTIN, *supra* at 25-39; 30 C.F.R. § 250.204.

cancel the lease and "the lessee shall be entitled to compensation. . . . " 43 U.S.C. § 1340(c)(1).

Finally, to aid this Court's appreciation of the background of this case, under 43 U.S.C. § 1351(h)(1)(B), the Secretary's initial approval of a POD includes a separate requirement, *not applicable at the exploration stage*, that the development and production plan either must have *already* received coastal zone consistency certification approval from any affected state, or the Secretary of Commerce must have already overridden the state's objection pursuant to 16 U.S.C. § 1456. If state CZMA approval or a Secretarial override cannot be shown in the first instance, 43 U.S.C. § 1351(h)(2)(A) carries the unique provision that the "lessee shall not be entitled to compensation [under the OCSLA] because of such disapproval [of the development and production plan]."

In the instant action, the Lessees prepared and filed a Plan of Exploration for their OCS leases pursuant to the OCSLA's lease exploration provisions, 43 U.S.C. § 1340. As expressly recognized by the Federal Circuit's decision, however, the MMS was prohibited from taking any action with regard to this POE by the Outer Banks Protection Act ("OBPA"), P.L. No. 101-380, § 6003, 104 Stat. 484, 555 (1990), which was enacted as a rider to the Oil Pollution Act of 1990, at the behest of the North Carolina delegation in Congress some nine years after issuance of the leases at issue.

REASONS FOR GRANTING THE WRITS

A. The Federal Circuit Decision Destroys the OCS Lease Bargain

1. The Decision Ignores the OCS Lease Terms by Focusing on "Permit Denials"

In describing the OCS Lessor/Lessee contractual relationship, the Federal Circuit panel decision

recognized that the "[l]ease terms grant lessees the 'exclusive right and privilege to drill for, develop, and produce oil and gas resources' in exchange for an up-front cash bonus and periodic lease payments." *See* Petitioner's Appendix ("App."), Docket No. 99-244 at 3a.[5] This statement captures the long-accepted understanding of the obligation undertaken by the lessee of an OCS lease. In return for payments of up-front cash bonuses, followed by periodic lease rental payments, the lessee obtains the exclusive right, *if* its assessment of the leased property suggests further activity is warranted, to begin planning for the exploration and possible future development of the lease. Indeed, it was *at this very part of the lease process* – the filing of the initial POE – that the federal government's critical breach in this case – the eleventh-hour enactment of the OBPA – occurred.

The Federal Circuit's examination of the OCS lease relationship, however, stops at this point. At first, the lower court came close to the critical question of whether the OBPA could interfere with an existing contractual relationship: "[t]o read the original contract between the parties as incorporating all future actions, whether by statute or regulation, by one of the parties would raise serious questions about illusory contracts, and perhaps questions of due process and other constitutional concerns." App. 10a. But the panel majority then conducts a precipitous retreat: "[i]n any event, because the outcome of the case does not turn on this issue, we need not further dwell upon it." *Id.* Thereafter, avoiding any real focus on the impact of the OBPA on the government's

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[5] *Marathon Oil Co. v. United States*, 177 F.3d 1331 (Fed. Cir. 1999). Subsequent citations to the decisions below will continue to refer to the Appendix to the Petitioner's writ application in Docket No. 99-244.

contractual conduct, the panel majority locks its attention on a collateral issue involving an event *subsequent* to the POE filing, the CZMA consistency objection.

The OBPA's enactment cannot be so lightly ignored. As correctly observed by the Court of Federal Claims, the OBPA *materially altered both the structure and framework of the Petitioners' leases, and the leasing process itself.* As such, the OBPA's new terms and conditions cannot be read into their leases. Moreover, as the court noted,

> common sense suggests that no sophisticated oil and gas company with many years of experience in drilling for oil in offshore leased tracts would knowingly agree to pay the huge, up-front considerations here involved for such tenuous and unilaterally interruptable drilling rights.

App. 63a.[6] This is a precise description of the nature of the government's breach in this case: the OBPA's "material alteration" of the structure and framework of the OCS lease bargain, and the attempted creation of "tenuous and unilaterally interruptable" drilling rights. Indeed, the crux of this dispute is the OBPA's effect of *wholesale contractual frustration.* It is *not,* as characterized by the Federal Circuit, a mere sideline dispute involving a "permit denial" or a CZMA "consistency complaint." Notwithstanding the Federal Circuit's re-characterization of this case as merely involving the filing of a single POE and a resultant "denial of permits," there *are no* actual "denials" of either a POE, or a permit application, in the record before this Court, because the OBPA prohibited MMS from acting on the Lessees' POE.

The Federal Circuit panel's spurious issue of "regulatory denials" is essentially the remainder of certain lines of reasoning that had underpinned the Federal Circuit

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[6] *Conoco Inc. v. United States*, 35 Fed. Cl. 309, 324 (Fed. Cl. 1996).

panel's initial opinion, but were later removed. As noted earlier, the initial panel decision contained numerous errors in describing the interaction between the OCSLA and the CZMA and the proper construction of an OCS lessee's "performance." First, the initial panel decision had misread the OCSLA to require a lessee to receive CZMA state concurrence for its POE or face lease cancellation without compensation. The panel based its rejection of the restitution remedy on the Lessees' alleged resultant "violation" of the OCSLA.[7] But in arriving at this conclusion, the court erroneously relied on 43 U.S.C. § 1351, the provision of the CZMA that applies to development and production plans, *not* Plans of Exploration. On rehearing, the panel corrected this error, and removed all direct references to § 1351.

In addition, the panel majority asserts that "North Carolina's legally valid objection to the consistency certification *left unfulfilled the requirement that the lessees demonstrate compliance with [all] applicable statutes and regulations.*" App. 12a (emphasis added).[8] This statement

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[7] App. 36a. *Marathon Oil Co. v. United States*, 158 F.3d 1253 (Fed. Cir. 1998), superseded by *Marathon Oil Co. v. United States*, 177 F.3d 1331 (Fed. Cir. 1999). The panel wrote that "[u]nder these circumstances, a lessee's options are to 'submit an amendment to such plan, or a new plan, to the Secretary of the Interior,' " *citing* 16 U.S.C. § 1456(c)(3)(B). App. 37a. But as demonstrated by Petitioners' arguments, the OBPA would only have further frustrated their attempts to submit such an amended plan.

[8] The original panel decision had gone even further, and reasoned that "[u]nder the circumstances of this case, to treat the *denial of the POE* as a breach of contract by the Government would be to eviscerate these salutary protections of the nation's fragile coastal lands and waters." App. 34a (emphasis added). In other words, the panel had so misread the statute that it believed that the MMS was entitled to deny an exploration plan

finds no support in the CZMA, the OCSLA, or MMS regulations. The Lessee fully demonstrated "compliance with [all] applicable statutes and regulations," when adding the consistency certification, as called for by 43 U.S.C. § 1340(c)(2), to their POE filing. North Carolina's disagreement with the certification in no way establishes a failure by the Lessees to comply with the law.

The panel decision under review now rests on a more narrowly-conceived legal analysis, *i.e.*, that North Carolina's CZMA consistency objection, *per se*, annulled all other concerns over the federal government's contractual conduct. The CZMA objection, by itself, has thus been elevated far beyond its tangential role in this OCS lease dispute.[9] As shown below, the panel's final decision not only refuses to address the federal government's own OCS lease obligation, and thereby continues to misconstrue the law and the terms of the OCS lease, but also continues to ignore the federal government's own public-record position on the effects of the OBPA, and on the Lessees' lease performance.

2. The Decision Fails to Enforce Reciprocal OCS Lease Performance

The panel majority cites Section 10 of the MMS's OCS lease form, noting that it provides that lessees "shall

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on CZMA consistency grounds. Instead, 43 U.S.C. § 1340, the section of the OCSLA dealing with exploration activity, *separates* the CZMA consistency certification concurrence process from the MMS's decision to approve or disapprove the plan of exploration. Once again, the panel's decision on rehearing dropped its reference to a POE "denial."

[9] To repeat: (1) there was no "denial" of the Lessees' POE by the MMS; and (2) there could have been no lawful denial of the Lessees' POE on CZMA consistency grounds.

comply with all regulations and orders relating to exploration, development, and production." App. 10a. Clearly, the lease carries with it attendant regulatory requirements, but as discussed in more detail below, the record shows that the MMS strongly endorsed the Petitioners' own lease compliance and performance in entering into the exploration stage of the leasing process. Moreover, as noted by the Court of Federal Claims:

> The lease agreements do not specifically state the parties' obligations regarding exploration plans but provide that the lessees agree to 'comply with all regulations and orders relating to exploration.' Under the OCSLA and its regulations, exploration may only be conducted pursuant to approved exploration plans. Thus, in order to explore, plaintiffs are obligated to prepare and submit exploration plans. *The necessary reciprocal obligation is that the government will timely and fairly consider – not necessarily approve, but at least promptly consider – exploration plans properly submitted.*

App. 70a (emphasis added) (citing the MMS's express statutory duty under the OCSLA to approve or otherwise act on plans within thirty days of submission, 43 U.S.C. § 1340(c)(1)). Stated differently, "the contracts at issue provide that submission of plaintiffs' POEs is predicated on an *unequivocal governmental duty* to timely and fairly consider, though not necessarily approve, them." App. 72a (emphasis added). More tellingly, the court also recognized that:

> It is not necessary [to the finding of a contractual breach in this case] for plaintiffs to have actually submitted such exploration plans because it is clear [the United States] cannot and will not perform its end of the bargain as required by the OCSLA.

App. 73a. Thus, under the Court of Federal Claims' proper reading of the OCS Lease and the law of contracts,

the Lessees deserve restitution in this case even without consideration of their actual filing of a POE. *A fortiori*, the Lessees are entitled to restitution without consideration of an attendant POE filing event, *i.e.*, the lodging of North Carolina's CZMA objection.

3. The Decision's Misguided View of Lease Performance Cannot Support Confiscation of the Lease Bonuses

Avoiding analysis of the reciprocal obligations highlighted by the Court of Federal Claims, the Federal Circuit's decision attacks the Lessees' "performance." The panel majority repeatedly refers to the state's CZMA consistency objection to the POE, implying that such "environmental concerns" excuse or can even validate the government's contractual misconduct. For example, the panel majority writes that "North Carolina's legally valid objection to the consistency certification left unfulfilled the requirement that the lessees demonstrate compliance with applicable statutes and regulations, compliance with which was a prerequisite to obtaining the necessary permits and licenses." App. 12a. Two paragraphs later, the court starkly suggests that any finding of federal misconduct in the role played by the OBPA in Petitioners' lease delays would be tantamount to "eviscerat[ing] . . . salutary protections of the nation's fragile coastal lands and waters." App. 13a.

These observations are without foundation.

The Federal Circuit's complaint of the Lessees' "nonperformance" completely ignores the fact that the MMS has repeatedly described the Lessees' "lease performance" on the record in superlative terms. For example, the MMS Deputy Director described the Environmental Report prepared for the Lessees' Manteo project as "the most comprehensive body of environmental information ever assembled on a proposed well in the history of the

U.S. offshore drilling program."[10] Moreover, at the time of its filing the MMS announced that the Lessees' POE was the *most comprehensive exploration plan ever submitted to the agency*.[11] Finally, Interior Secretary Lujan publicly acknowledged that the Lessees' POE, as submitted, was "approvable in all respects" under all MMS requirements, and that the agency's hands were tied by the provisions of the OBPA – *not* by agency concerns over the "salutary protections of the Nation's fragile coastal lands and waters."[12] In other words, the federal government, as lessor, itself never asserted that the Lessees' project raised serious "environmental concerns," and the panel majority inappropriately introduced this issue into the lease dispute.

Moreover, the panel majority states that the effect of the OBPA on Petitioners' leases is irrelevant, because "appellees' failure to overcome North Carolina's objections resulted in a delay that preceded and extended

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[10] 21 Environment Reporter, *Current Developments*, (BNA) June 8, 1990, p. 314; *see also* A.949-50.

[11] September 29, 1990 MMS News Release. The MMS even submitted public comments strongly supporting the Lessees' request to the Secretary of Commerce to override North Carolina's CZMA objections. In these public comments, the MMS observed that:

> An unbiased consideration of the analyses and conclusions contained within the Final [Environmental Report] and the [Environmental Assessment] will result in a determination that no significant effects are expected in the area of the Manteo Prospect, or to the State's coastal zone resources, as a result of Mobil drilling a single exploration well nearly *39 miles* from shore.

MMS Comments, June 4, 1991 at p. 9 (emphasis in original).

[12] App. 13a; A. 963.

throughout the period in which the OBPA was effective." App. 13a. This assertion is directly undercut by the federal government's own actions. The *MMS*, recognizing the dictates of the OBPA, issued *sua sponte* in 1990 a unilateral suspension of ongoing operations for the Petitioners' North Carolina leases based solely on the OBPA. Moreover, Interior Secretary Lujan stated publicly that the OBPA would support additional delays, and the preparation of additional studies, far into the development and production stage of Lessee's OCS leases: "[t]he objectives of any future . . . recommended studies will be reviewed at each phase of development."[13]

In addition, and as the legislative history of the OBPA cited by Petitioners clearly reveals, North Carolina's "consistency objection" was merely a single weapon in a formidable political arsenal to oppose *any and all* drilling off its coastline without regard to particular environmental impacts. Indeed, long before the State's CZMA consistency objection, which was based on allegedly "insufficient information", *was even issued*, the public record confirms that North Carolina Governor James G. Martin had already announced, in correspondence to President Bush, that North Carolina was opposed *per se* to any offshore drilling before the year 2000, *regardless of the completion of any "new studies,"* or, for that matter, any showing of the absence of adverse impacts of Lessees' exploratory drilling activity.[14]

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[13] *Report to Congress on the Findings of the North Carolina Environmental Sciences Review Panel* (April 6, 1992), Manuel Lujan, Secretary of the Interior, A. 414.

[14] Scott Pendleton, *Offshore Drilling Ban Draws Fire*, The Christian Science Monitor, July 6, 1990 at 8, available in LEXIS, News Library, Arcnews File (reporting Governor Martin's request to the President, and his corresponding entreaty for help from the State's congressional delegation); Thomas C.

In comments later to the MMS on the Lessees' POE, the Governor reiterated his complaint that North Carolina should have been included in those portions of the OCS for which a 10-year drilling moratorium had been granted, and again announced that *"only if the present policy changes [i.e., the ten-year drilling moratorium] or a critical domestic energy crisis develops will I re-evaluate my opposition to Mobil's drilling proposal."* (Emphasis added.) Accordingly, it is critically important to understand North Carolina's opposition to *all* offshore drilling, as well as its overriding concern with later stages of OCS development, in approaching the Lessees' "failure" to obtain the State's CZMA consistency concurrence for the drilling of a single exploratory well.

4. The Decision Alters the OCSLA's Economic Risk Structure

Even while acknowledging that the OBPA and subsequent events may have affected the Petitioners' rights to explore and develop their OCS tracts, the Federal Circuit nevertheless authorized the confiscation of Petitioners' up-front "bonuses," asserting that it could find

> no principled distinction between a lessee whose hopes for large rewards from such a lease are frustrated by a failure to obtain the necessary permits for exploration, and those of a lessee whose hopes are drowned by impossible weather, equipment failures, financial setbacks,

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Hays, *Oil Concerns Criticize Offshore-Curb Plan*, The New York Times, June 28, 1990 at D-7, available in LEXIS, News Library, Arcnews File. *See also* Matthew Davis, State News Service, June 28, 1990 available in LEXIS, News Library, Arcnews File (describing the "solid front" formed by Governor Martin and the North Carolina congressional delegation to oppose all offshore drilling).

> or any number of other circumstances beyond the lessee's control. In either case, the lessee contracted for the exclusive opportunity to explore in a certain area; the inability of a lessee to explore, if not attributable to the Government, does not create an entitlement to any refund of the consideration paid to obtain the lease.

App. 15a. Thus, the court saw no "principled distinction" between *force majeure* or other accidental events, and the Congress's imposition, at the request of the North Carolina delegation, of the political gauntlet of the OBPA.

In its ruling, the Federal Circuit's majority decision has overturned a long-standing and vital principle underlying the essential OCS lease bargain: the OCS lessee's "huge, up-front considerations" are payment for the essential right to explore for oil and gas which *may or may not* be found. In turn, the reward of successfully finding and profitably producing oil and gas is balanced against the overarching risk, borne by the OCS lessee, that the oil and gas will *not* be found, or cannot be produced in profitable quantities. That risk includes the OCS lessee's exposure to not only the loss of its up-front bonus payments, but often to the loss of additional substantial investments involving many millions of dollars – devoted to the initial lease exploration and development activity. The panel majority's expansion of the lessee's risk even further, by finding a facile analogy between a lessee's risk of dilatory *force majeure* events or other contingencies, and the OBPA's serial array of governmental obstacles that *completely stifled* Petitioners' lease activities, destroys the "bargain" between OCS lessees and the government. In fact, as duly noted by the Petitioners, the Federal Circuit's decision casts into doubt a basic contractual balance underlying not only the thousands of currently

outstanding OCS leases, but also an untold number of other highly valuable government contracts.

Judge Newman's dissent captures the essence of the panel's error. When encountering the same passage from the majority opinion quoted above, Judge Newman recognized that:

> [such an] analysis is not supportable by any legal or equitable theory. What Marathon paid for was the right of exploration. Marathon bore the risk that the exploration might fail to find oil or gas, but Marathon did not bear the risk that exploration would be entirely barred, especially by the same party from whom it bought the right.

App. 21a. In Judge Newman's view, this case posed this fundamental question: "whether the government shall deal fairly and legally with its contracting partners," App. 18a. As Judge Newman succinctly noted:

> While it was the objection of North Carolina that led to the prohibition of exploration of the Outer Banks, first by state refusal to certify the exploration, then by [Congress's] enactment of the Outer Banks Protection Act, and then by the refusal of the Secretary of Commerce to override the state's objection, *this does not justify the federal government's confiscation of Marathon's payment for a contract entered into before any such objection arose.*

Id. (emphasis added).

This Court should correct this drastic error in order to preserve the integrity of the OCS leasing program. If the panel's ruling is left in place, OCS lessees will be subject to a rule of law that allows the government to confiscate their entire lease consideration if, while beginning the initial CZMA consistency certification process, a newly-enacted federal statute arbitrarily upsets both

ongoing and future lease operations. If allowed to stand, this erroneous ruling would rearrange the entire economic structure of the OCSLA, thereby shifting enormous and unintended economic risks to lessees. And, as observed by the Petitioners, the Federal Circuit's decision creates an even larger uncertainty as to when the remedies of rescission and restitution are *ever* available against the federal government – effectively vitiating the fundamental presumption underlying government contracting that "[t]he United States does business on business terms." *United States v. National Exch. Bank*, 270 U.S. 527, 534 (1926).

B. The Integrity of the OCS Leasing Program is Vital to This Nation

The widespread effects of the Federal Circuit decision on other OCS lessees and on the future of the OCS leasing program should lead the Court to grant the Petitions. The OCS leasing program is vital to the nation.[15] By the end of 1998, over eleven billion barrels of oil and 130 trillion cubic feet of natural gas have been produced.[16] In 1997, the OCS accounted for fully 26% of domestic natural gas production, and 20% of domestic oil production.[17]

At the end of 1998, nearly 8400 oil and gas leases issued under the OCSLA existed on the nation's Outer

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[15] The Congress has declared that the OCS is a *"vital national resource reserve . . .* which should be made available for expeditious and orderly development. . . . " 43 U.S.C. § 1332(3) (emphasis added).

[16] *Statistical Highlights Fiscal Year 1997*, U.S. Department of the Interior, Minerals Management Service (1998); *MMS Offshore Stats, Third and Fourth Quarters 1998*, U.S. Department of the Interior, Minerals Management Service.

[17] *Id.*

Continental Shelf.[18] Additional leases have been issued by the MMS in 1999, and lease sales will continue into the foreseeable future. Over the last ten and one-half years, OCS lessees have paid the federal government over $6 billion in lease bonuses,[19] and the MMS collected over $1.4 billion in lease bonuses in 1997, and another $1.3 billion in 1998.[20] As of June of this year, over 85% of all oil royalties paid on Federal and Indian leased lands came from the OCS, and over 77% of gas royalties.[21]

In light of the Federal Circuit's ruling, all OCS lessees, as well as bidders at future OCS lease sales, will be faced with stark uncertainties regarding the OCSLA statutory scheme. The most disturbing aspect of the panel majority's decision is the denial of restitution or other compensation to a lessee in the face of unilateral federal and state decisions which thwart lease activity. This will mean that every OCS lessee beginning lease exploration will now risk losing its entire lease investment – even if it complies fully with every MMS requirement. As observed by the Court of Federal Claims, "common sense suggests that no sophisticated oil and gas company with many years of experience in drilling for oil in offshore leased

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[18] *MMS Offshore Stats, Third and Fourth Quarters 1998, supra* n.16.

[19] U.S. Bureau of Census, *Statistical Abstract of the United States: 1997* (117th Edition); Washington, D.C. (1997); *Mineral Revenue Collections, January-December 1998*, U.S. Department of the Interior, Minerals Management Service; *Mineral Revenue Collections, January-June 1999*, U.S. Department of the Interior, Minerals Management Service.

[20] *Mineral Revenue Collections, January-December 1998, supra* n.19. Bonuses received in the first and second quarters of 1999 totaled over $100 million. *Mineral Revenue Collections, January-June 1999, supra* n.19.

[21] *Mineral Revenue Collections, January-June 1999, supra* n.19.

tracts would knowingly agree to pay the huge, up-front considerations . . . for such tenuous and unilaterally interruptable drilling rights." App. 63a.

MMS lease records lend perspective to that court's observation. As of the end of 1998, only about 20% of existing OCS leases were in the "production" stage, meaning that wells had been drilled on those leases that are producing oil or natural gas.[22] Thus, the vast majority of existing leases issued under the OCSLA are in, or are still (or again) undergoing, the "exploration" stage of lease activity.[23] Considering that virtually all of these active leases are located offshore of states with approved coastal zone management programs, each and every one of these OCS lessees which pursues exploration will undergo the CZMA consistency certification process as part of its OCS drilling plans.[24] Therefore, the Federal Circuit's decision in this case, which has shattered protections afforded to lessees that must use that process, has potential impacts on countless present, and future, lease planning efforts.

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[22] *MMS Offshore Stats, supra* n.16.

[23] Between 1987 and 1998, nearly 4200 exploratory wells were drilled on the over 38 million acres under lease on the OCS. *Mineral Revenues 1997: Report on Receipts from Federal and Indian Leases*, U.S. Department of Interior, Minerals Management Service (November 1998); *MMS Offshore Stats, 3d & 4th Quarter 1998, supra* n.16. Some OCS leases that are not currently "producing" could contain now-depleted wells, thus rendering those leases also subject to a return to the exploration stage of activity.

[24] *See* 43 U.S.C. § 1340(c)(2) (applying CZMA consistency certification requirements to exploration plans.)

API is also concerned that the Federal Circuit's implicit endorsement of North Carolina's objection to the POE consistency certification due to the "inadequacy of information" will only embolden other coastal states that philosophically oppose *all* offshore development to misuse the CZMA and OCSLA processes. In addition, the panel majority's decision can only encourage other Congressional interference with OCS mineral exploration and development activity for overtly political reasons. Under the lower court's ultimate ruling, if such future Congressional action is accompanied by contemporaneous state CZMA objections, the government may evidently breach its leases with impunity. Accordingly, the industry's incentive to bid for OCS leases, especially in new, frontier OCS areas, will be drastically undercut.

CONCLUSION

For the reasons stated above, the Court should grant the petitions.

Respectfully submitted,

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Nos. 99-244 and 99-253

Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MARATHON OIL COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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JOINT APPENDIX

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PETITIONS FOR CERTIORARI FILED: AUGUST 10, 1999 (99-244) AND AUGUST 11, 1999 (99-253)
CERTIORARI GRANTED: NOVEMBER 15, 1999

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UNITED STATES DISTRICT COURT
UNITED STATES COURT OF FEDERAL CLAIMS

Civil Case No. 92-CV-331

MARATHON [CONOCO]

v.

UNITED STATES OF AMERICA

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
5/7/92	1	COMPLAINT FILED FILING FEE $ 120 RECEIPT # 30332 Answer due on 7/6/92. (mm) [Entry date 11/22/93]
5/7/92	2	MOTION by CONOCO, INC. (Service : 5/7/92) for Notice to Third Parties [Chevron USA Inc.; Murphy Oil USA, Inc.; Odeco Il & Gas Co.; OXY USA Inc.; Pennzoil Exploration & Production Co.; Shell Offshore Inc.; Union Oil Co. of California; Amerada Hess Corp.; Marathon Oil Co.; Mobil Exploration & Producing U.S. Inc.] Copies (4) served on defendant. Response due: 5/24/92 (mm) [Entry date 11/22/93]
5/7/92	3	Notice of assignment to Judge Wilkes C. Robinson. Copy to parties. (mm) [Entry date 11/22/93]
6/16/92	4	ORDER entered directing the issuance of Rule 14 notices as specified in □[2-1] motion for Notice to Third Parties submitted (signed by Judge Wilkes C. Robinson) . Copy to parties. Notices issued this day and delivered to plaintiff's attorney for service. (mm) [Entry date 11/22/93]

DATE	NO.	PROCEEDINGS
10/28/92	5	THIRD-PARTY COMPLAINT (7 separate) by OXY USA INC., AMERADA HESS CORP., PENNZOIL EXPLORATION, UNION OIL COMPANY, CHEVRON USA INC., MARATHON OIL COMPANY, MURPHY EXPLORATION, MURPHY OIL USA, INC. Service: 10/28/92 FILING FEE $ 120 for each RECEIPT # 32218-32224. Answer due 12/27/92 (mm) [Entry date 11/22/93] [Edit date 11/23/93]
12/10/92	6	THIRD-PARTY COMPLAINT (4 separate) FILED by AMOCO PRODUCTION, MOBIL EXPLORATION, SHELL FRONTIER OIL, and TEXACO EXPLORATION. Service: 10/28/92 FILING FEE $ 120 for each complaint. RECEIPT # 32728-32731. Answer due 12/27/92 (mm) [Entry date 11/23/93]
2/22/93	7	ORDER entered directing the Dismissing of third party plaintiff Mobil Exploration and Producing U.S., Inc. complaint without prejudice (signed by Judge Wilkes C. Robinson) . Copy to parties. (mm) [Entry date 11/23/93]
11/2/93	8	CORRECTED MOTION by USA (Service: 11/1/93) to Extend Time to complete discovery (to May 30, 1994) . Response due: 11/18/93 (mm) [Entry date 11/23/93]
11/10/93	9	MOTION by third party plaintiffs' AMERADA HESS CORP. et al (Service : 11/10/93) for Protective Order precluding certain depositions. Response due: 11/29/93 (mm) [Entry date 11/23/93]
11/12/93	—	Status Conference held (Transcript due 12/13/93) . (mm) [Entry date 12/06/93]

DATE	NO.	PROCEEDINGS
11/15/93	10	ORDER mooting [9-1] motion for Protective Order precluding certain depositions, granting in part, denying in part [8-1] motion to Extend Time to complete discovery reset Discovery deadline to 2/15/94, reset Dispositive Motion Filing deadline to 4/1/94 (signed by Judge Wilkes C. Robinson) . Copy to parties. (mm) [Entry date 11/23/93]
11/19/93	11	[Stipulated] MOTION by CONOCO, INC. and USA to Extend Time within which to respond to discovery requests, (until December 3, 1993) and reset Discovery deadline. Response due: 12/6/93. (hw) [Entry date 11/26/93]
12/1/93	12	ORDER granting [11-1] motion to Extend Time within which to respond to discovery requests, granting [11-2] motion to reset Discovery deadline. (signed by Judge Wilkes C. Robinson) Copy to parties. (ds) [Entry date 12/03/93]
12/1/93	13	TRANSCRIPT of proceedings re: 1 volume, at Washington, D.C., for date of November 12, 1993 . Notice to parties. (mm) [Entry date 12/06/93]
12/3/93	14	MOTION by CONOCO, INC., USA and AMERADA HESS CORP., ET AL. to Extend Time to respond to discovery requests (to December 22, 1993, for all parties). (bh) [Entry date 12/06/93]
12/3/93	15	MOTION by AMERADA HESS CORP. (Service: 12/3/93) for Protective Order. Response due: 12/20/93 (bh) [Entry date 12/06/93]

DATE	NO.	PROCEEDINGS
12/7/93	16	ORDER granting [15-1] motion for Protective Order and expanding the protective order of 9/3/93, to include attachment A to order. (signed by Judge Wilkes C. Robinson) Copy to parties. (ds) [Entry date 12/08/93]
12/7/93	17	SUPPLEMENTAL STIPULATED PROTECTIVE ORDER (signed by Judge Wilkes C. Robinson). Copy to parties. (ds) [Entry date 12/08/93] [Edit date 12/08/93]
12/7/93	18	ORDER granting [14-1] motion to Extend Time to respond to discovery requests (signed by Judge Wilkes C. Robinson) Copy to parties. (ds) [Entry date 12/98/93]
12/8/93	19	MOTION by AMERADA HESS CORP. (Service : 12/8/93) for Confidentiality Order, and to Expedite decision thereon. Response due: 12/27/93 (bh) [Entry date 12/09/93]
12/17/93	20	NOTICE of change of address by CONOCO, INC. Service: 12/17/93 (ds) [Entry date 12/20/93]
12/17/93	21	RESPONSE by USA to [19-1] motion for Confidentiality Order, [19-2] motion to Expedite decision thereon. Service: 12/17/93. Reply due: 1/3/94 (bh) [Entry date 12/20/93]
12/21/93	22	ORDER granting [19-1] motion for Confidentiality Order, granting [19-2] motion to Expedite decision thereon, with the Protective Order of 9/3/93 expanded to include Attachment A to [this] order. (Signed by Judge Wilkes C. Robinson) Copy to parties. (bh) [Entry date 12/23/93]

DATE	NO.	PROCEEDINGS
12/22/93	23	JOINT MOTION to Extend Time to respond to discovery requests (to January 15, 1994). (bh) [Entry date 12/30/93]
1/3/94	24	ORDER granting [23-1] joint motion to Extend Time to respond to discovery requests (signed by Judge Wilkes C. Robinson) Copy to parties. (hw) [Entry date 01/04/94]
1/14/94	25	MOTION by USA (Service : 1/14/94) to Amend answers to assert offset claims. Response due: 1/31/94 (bh) [Entry date 01/24/94]
1/14/94	26	JOINT MOTION to Extend Time for all parties to respond to one anothers' discovery requests (to January 31, 1994). (bh) [Entry date 01/24/94]
1/21/94	27	ORDER granting [26-1] joint motion to Extend Time for all parties to respond to one anothers' discovery requests. (signed by Judge Wilkes C. Robinson) Copy to parties. (bh) [Entry date 01/25/94]
1/26/94	28	MOTION by USA (Service : 1/26/94) to Compel production of documents. Response due: 2/14/94 (bh) [Entry date 02/01/94]
1/31/94	29	RESPONSE by CONOCO, INC., AMERADA HESS CORP. ET AL. to [25-1] motion to Amend answers to assert offset claims. Service: 1/31/94 [Reply date: 2/14/94] (bh) [Entry date 02/02/94]
2/14/94	30	RESPONSE by CHEVRON USA INC. to [28-1] motion to Compel production of documents. Service: 2/14/94 Reply due: 2/28/94 (bh) [Entry date 02/15/94]

DATE	NO.	PROCEEDINGS
2/14/94	31	MOTION by AMERADA HESS CORP., ET AL. (Service : 2/14/94) for Second Supplemental Protective Order. Response due: 3/3/94 (bh) [Entry date 02/15/94]
2/14/94	32	MOTION by USA (Service : 2/14/94) to Extend Time to reply to third-party plaintiff's discovery requests (to February 16, 1994). (bh) [Entry date 02/16/94]
2/14/94	33	MOTION by USA (Service : 2/14/94) to Extend Time to reply to plaintiff's discovery requests (to February 16, 1994). (bh) [Entry date 02/16/94]
2/14/94	34	MOTION by USA (Service : 2/14/94) to Extend Time to reply to the opposition to motion to amend answers (to February 16, 1994). (bh) [Entry date 02/16/94]
2/16/94	35	REPLY by USA to response to [25-1] motion to Amend answers to assert offset claims. Service: 2/16/94 (ds) [Entry date 02/17/94]
2/16/94	36	ORDER granting [34-1] motion to Extend Time to reply to the opposition to motion to amend answers set Notice of Compliance deadline to 2/16/94 (signed by Judge Wilkes C. Robinson) Copy to parties. (hw) [Entry date 02/22/94]
2/16/94	37	ORDER granting [32-1] motion to Extend Time to reply to third-party plaintiff's discovery requests. Deadline reset until February 16, 1994 (signed by Judge Wilkes C. Robinson). Copy to parties. (hw) [Entry date 02/22/94]

DATE	NO.	PROCEEDINGS
2/16/94	38	ORDER granting [33-1] motion to Extend Time to reply to plaintiff's discovery requests. Deadline reset until February 16, 1994 (signed by Judge Wilkes C. Robinson). Copy to parties. (hw) [Entry date 02/22/94]
2/16/94	39	ORDER granting [31-1] motion for Second Supplemental Protective Order (signed by Judge Wilkes C. Robinson). Copy to parties. (hw) [Entry date 02/22/94]
2/16/94	40	MOTION by USA (Service : 2/15/94) to Compel production of documents. Response due: 3/4/94. (hw) [Entry date 02/22/94]
2/23/94	41	MOTION by CONOCO, INC., AMERADA HESS CORP., ET AL. (Service by hand: 2/23/94) for Leave to File surreply memorandum in response to defendant's reply to opposition to motion for leave to amend answers to assert offset claims. Response due: 3/9/94 (bh) [Entry date 02/28/94]
2/28/94	42	MOTION by USA (Service : 2/28/94) to Extend Time to reply to CHEVRON'S opposition to motion to compel (to March 2, 1994). (bh) [Entry date 03/04/94]
3/1/94	43	REPLY by USA to response [by third party plaintiff, Chevron U.S.A.] to [28-1] motion to Compel production of documents. Service: 3/1/94. (hw) [Entry date 03/07/94]
3/3/94	44	ORDER scheduling oral argument for March 17, 1994 at 10:00 a.m. (signed by Judge Wilkes C. Robinson). Copy to all parties. (ds) [Entry date 03/08/94]

DATE	NO.	PROCEEDINGS
3/3/94	45	ORDER granting [41-1] motion for Leave to File surreply memorandum in response to defendant's reply to opposition to motion for leave to amend answers to assert offset claims. (signed by Judge Wilkes C. Robinson) Copy to parties. (ds) [Entry date 03/08/94]
3/3/94	46	SUR-REPLY MEMORANDUM by CONOCO, INC., OXY USA INC., ET AL. in response to USA's reply to opposition to motion for leave to amend answers to assert counterclaims. (ds) [Entry date 03/08/94]
3/4/94	47	MOTION by USA (Service : 3/4/94) to Withdraw [40-1] motion to Compel by USA. Response due: 3/21/94 (bh) [Entry date 03/09/94]
3/14/94	48	MOTION by USA (Service : 3/14/94) for modification of the order of briefing so that plaintiff's and third-party plaintiffs' dispositive motions be filed first, or in the alternative, to Extend Time to file dispositive motion (to April 15, 1994). Response due: 3/31/94 (bh) [Entry date 03/16/94]
3/16/94	49	MOTION by CONOCO, INC., OXY USA INC., AMERADA HESS CORP., PENNZOIL EXPLORATION, UNION OIL COMPANY, CHEVRON USA INC., MARATHON OIL COMPANY, MURPHY EXPLORATION, MURPHY OIL USA, INC., AMOCO PRODUCTION (Service: 3/16/94) for Leave to File stipulations and stipulation exhibits Response due: 4/2/93 (mm) [Entry date 03/21/94]

DATE	NO.	PROCEEDINGS
3/16/94	50	RESPONSE by CONOCO, INC., OXY USA INC., AMERADA HESS CORP., PENNZOIL EXPLORATION, UNION OIL COMPANY, CHEVRON USA INC., MARATHON OIL COMPANY, MURPHY EXPLORATION, MURPHY OIL USA, INC., AMOCO PRODUCTION to [48-1] motion for modification of the order of briefing, or in the alternative [48-2] motion to Extend Time to file dispositive motion Service: 3/16/94 Reply due: 3/28/94 (mm) [Entry date 03/22/94]
3/17/94	—	Oral Argument re: [41-1] motion for Leave to File surreply memorandum in response to defendant's reply to opposition to motion for leave to amend answers to assert offset claims. Response due: 3/9/94 by AMERADA HESS CORP., CONOCO, INC. (Transcript due 4/18/94) (mm) [Entry date 03/18/94]
3/18/94	51	ORDER granting in part, denying in part [48-1] motion for modification of the order of briefing; resetting Simultaneous Motions for Summary Judgment Filing deadline to 4/8/94; setting Joint Status Report deadline for 3/25/94; setting Supplemental Brief deadline to 4/1/94 for plaintiffs and third-party plaintiffs [defendant to respond 4/8/94] ; and setting Notice of Compliance deadline to 3/21/94 for CHEVRON to submit IN CAMERA documents to the court for inspection. (signed by Judge Wilkes C. Robinson) Copy to parties. (bh) [Entry date 03/23/94]
3/22/94	54	TRANSCRIPT of proceedings re: 1 volume, at Washington, D.C., for date of March 17, 1994 exhibits: . Notice to parties. (mm) [Entry date 04/01/94]

DATE	NO.	PROCEEDINGS
3/25/94	52	MOTION by USA (Service : 3/25/94) For leave to exceed the page limitation of its brief in support of its motion for summary judgment [totaling 100 pages]. (bh) [Entry date 03/29/94]
3/25/94	53	STATUS REPORT by CONOCO, INC., USA, OXY USA INC., AMERADA HESS CORP., PENNZOIL EXPLORATION, UNION OIL COMPANY, CHEVRON USA INC., MARATHON OIL COMPANY, MURPHY EXPLORATION, MURPHY OIL USA, INC., AMOCO PRODUCTION, TEXACO INC., MOBIL OIL CORP., MOBIL OIL EXPLOR, SHELL WESTERN E & P, SHELL OFFSHORE INC., TEXACO EXPLORATION, SHELL FRONTIER OIL, MOBIL EXPL & PRODUC, MOBIL EXPLORATION Service: 3/25/94 (mm) [Entry date 03/29/94]
4/1/94	55	SUPPLEMENTAL BRIEF by CONOCO, INC., AMERADA HESS CORP., et al. re: AMERICOLD case. Service by hand: 4/1/94 (ds) [Entry date 04/02/94]
4/4/94	56	ORDER granting [52-1] motion For Leave to exceed the page limitation; and allowing all parties to expand their briefs up to 100 pages (signed by Judge Wilkes C. Robinson). Copy to parties. (ds) [Entry date 04/05/94]
4/7/94	57	MOTION by USA (Service : 4/7/94) to Extend Time for parties to file dispositive motions until April 12, 1994. Response due: 4/25/94 (rs) [Entry date 04/08/94]
4/8/94	58	Notice of filing proposed order by CONOCO, INC., OXY USA INC., AMERADA HESS CORP., PENNZOIL EXPLORATION, UNION OIL COMPANY, CHEVRON USA INC., MARATHON OIL COMPANY, MURPHY EXPLORATION, MURPHY OIL

DATE	NO.	PROCEEDINGS
		USA, INC., AMOCO PRODUCTION filed by leave of the judge. Service : 4/7/94 (mm) [Entry date 04/11/94] [Edit date 04/11/94]
4/8/94	59	RESPONSE by USA to [55-1] memorandum by AMERADA HESS CORP., CONOCO, INC., Service: 4/8/94 (mm) [Entry date 04/12/94]
4/11/94	60	ORDER granting [57-1] motion to Extend Time for parties to file dispositive motions set Motion Filing deadline to 4/12/94 (signed by Judge Wilkes C. Robinson). Copy to parties. (mm) [Entry date 04/12/94]
4/12/94	61	ORDER filed by leave of the judge. (mm) [Entry date 04/13/94]
4/12/94	62	MOTION by USA (Service: 4/12/94) for Summary Judgment, together with seven volumes of appendix. [Volume VII of Appendix placed IN CAMERA.] Response due: 5/13/94 (ds) [Entry date 04/14/94]
4/12/94	63	PROPOSED FINDINGS of Uncontroverted Fact by USA. Service: 4/12/94 [Volume II of Proposed Findings placed IN CAMERA.] (ds) [Entry date 04/14/94]
4/12/94	64	MOTION by CONOCO, INC. (Service: 4/12/94) for Summary Judgment, together with four separately bound volumes of exhibits [2 volumes of "Lease Sale" Exhibits; 2 volumes of "Post-Lease" "Moratoria" Exhibits]. Response due: 5/13/94 (ds) [Entry date 04/14/94]
4/12/94	65	PROPOSED FINDINGS of Uncontroverted Fact by CONOCO, INC. Service: 4/12/94 (ds) [Entry date 04/14/94]

DATE	NO.	PROCEEDINGS
4/12/94	66	MOTION by AMERADA HESS CORP. et al. (Service : 4/12/94) for Partial Summary Judgment. Response due: 5/13/94 (rs) [Entry date 04/14/94]
4/12/94	67	PROPOSED FINDINGS of Uncontroverted Fact by AMERADA HESS CORP., et al. Service: 4/12/94 (rs) [Entry date 04/14/94]
4/12/94	68	ORDER granting [49-1] motion for Leave to File stipulations and stipulation exhibits. (signed by Judge Wilkes C. Robinson) Copy to parties. (rs) [Entry date 04/14/94]
4/12/94	69	Stipulation of leases together with (FOUR (4) volumes of exhibits. [five parts total]. (rs) [Entry date 04/14/94]
4/21/94	70	ORDER entered scheduling a Status Conference for 10:00 a.m. on 4/26/94 (signed by Judge Wilkes C. Robinson) Copy to parties. (mm) [Entry date 04/28/94]
4/26/94	—	Status Conference held (Transcript due 5/26/94) (mm) [Entry date 04/29/94]
5/3/94	71	TRANSCRIPT of proceedings re: 1 volume, at Washington, D.C., for date of April 26, 1994. Notice to parties. (mm)
5/6/94	72	ORDER granting [28-1] motion to Compel production of documents; granting in part, denying in part [25-1] motion to Amend answers to assert offset claims; Responses to [66-1] [64-1] [62-1] motions for Summary Judgment reset to 5/24/94; Replies to responses [66-1] [64-1] [62-1] motions for Summary Judgment, reset to 6/17/94; defendant, plaintiff and 3rd party plaintiff allowed 65 pages for response briefs and 45 pages for reply briefs with plaintiff and 3rd party plaintiff given 100 pages total for both responses if they file them separately; and setting Answers and to assert offset claims deadline to 6/6/94 with plaintiff and 3rd party plaintiff to respond within 30 days from FILING. signed by Judge Wilkes C. Robinson) Copy to parties. (rs) [Entry date 05/16/94]

DATE	NO.	PROCEEDINGS
5/24/94	77	MOTION by USA (Service: 5/24/94) to Extend Time within which all parties may file their responses to dispositive motions, (until May 27, 1994) and to Extend Time within which all parties may file any replies to responses to their motions, (until June 20, 1994). Response due: 6/10/94 (hw) [Entry date 06/02/94]
5/27/94	74	RESPONSE by USA to [66-1] motion for Partial Summary Judgment, [64-1] motion for Summary Judgment; together with a separate volume of appendix. Service: 5/27/94; Reply due: 6/17/94 (per order of 5/6/94) (ds) [Entry date 06/02/94]
5/27/94	75	STATEMENT OF GENUINE ISSUES in response to Conoco's proposed findings of uncontroverted fact by USA. Service: 5/27/94 (ds) [Entry date 06/02/94]
5/27/94	76	STATEMENT OF GENUINE ISSUES in response to third party plaintiffs' proposed findings of uncontroverted fact by USA Service: 5/27/94 (ds) [Entry date 06/02/94]
6/1/94	78	STATEMENT OF GENUINE ISSUES by CONOCO, INC., OXY USA INC., AMERADA HESS CORP., PENNZOIL EXPLORATION, UNION OIL COMPANY, CHEVRON USA INC., MARATHON OIL COM-

DATE	NO.	PROCEEDINGS
		PANY, MURPHY EXPLORATION, MURPHY OIL USA, INC., AMOCO PRODUCTION, TEXACO INC., MOBIL OIL CORP., MOBIL OIL EXPLOR, SHELL WESTERN E & P, SHELL OFFSHORE INC., TEXACO EXPLORATION, SHELL FRONTIER OIL, MOBIL EXPL & PRODUC. and MOBIL EXPLORATION filed by leave of Judge. Service BY HAND: 5/27/94. (as) [Entry date 06/08/94]
6/1/94	79	STATEMENT OF GENUINE ISSUES [FILED UNDER SEAL] by CONOCO, INC., OXY USA INC., AMERADA HESS CORP., PENNZOIL EXPLORATION, UNION OIL CHEVRON USA INC., MARATHON OIL COMPANY, MURPHY EXPLORATION, MURPHY OIL USA, INC., AMOCO PRODUCTION, TEXACO INC., MOBIL OIL CORP., MOBIL OIL EXPLOR, SHELL WESTERN E & P, SHELL OFFSHORE INC., TEXACO EXPLORATION, SHELL FRONTIER OIL, EXPL & PRODUC. and MOBIL EXPLORATION filed by leave of Judge. Service BY HAND: 5/27/94. (as) [Entry date 06/08/94]
6/1/94	80	RESPONSE by CONOCO, INC., OXY USA INC., AMERADA HESS CORP., PENNZOIL EXPLORATION, UNION OIL COMPANY, CHEVRON USA INC., MARATHON OIL COMPANY, MURPHY EXPLORATION, MURPHY OIL USA, INC., AMOCO PRODUCTION, TEXACO INC., MOBIL OIL CORP., MOBIL OIL EXPLOR, SHELL WESTERN E & P, SHELL OFFSHORE INC., TEXACO EXPLORATION, SHELL FRONTIER OIL, MOBIL EXPL & PRODUC. and MOBIL EXPLORATION to

DATE	NO.	PROCEEDINGS
		[62-1] motion for Summary Judgment filed by leave of Judge. Service BY HAND: 5/27/94. Reply due: 6/7/94. (as) [Entry date 06/08/94] [Edit date 06/08/94]
6/2/94	81	ORDER granting [77-1] motion to Extend Time within which all parties may file their responses to dispositive motions, granting [77-2] motion to Extend Time within which all parties may file any replies to responses to their motions (signed by Judge Wilkes C. Robinson) Copy to parties. (tw) [Entry date 06/08/94]
6/2/94	—	Deadline updated; Reply to Response to Motion reset to 6/20/94 for [66-1] motion for Partial Summary Judgment, reset to 6/20/94 for [64-1] motion for Summary Judgment, reset to 6/20/94 for [62-1] motion for Summary Judgment (tw) [Entry date 06/08/94]
6/3/94	82	MOTION by USA (Service: 6/3/94) to Extend Time to file amended answers [to June 30, 1994]. (as) [Entry date 06/09/94]
6/9/94	83	ORDER granting [82-1] motion to Extend Time to file amended answers resetting Answers deadline to 6/30/94 (signed by Judge Marian B. Horn for Judge Robinson) Copy to parties. (rs) [Entry date 06/14/94]
6/17/94	84	MOTION by USA (Service: 6/17/94) to Extend Time to reply to oppositions to dispositive motions [to June 24, 1994]. (as) [Entry date 06/20/94]
6/21/94	85	ORDER granting [84-1] motion to Extend Time to reply to oppositions to dispositive motions Reply to Response to Motion reset to 6/24/94 for [66-1] motion for Partial

DATE	NO.	PROCEEDINGS
		Summary Judgment, reset to 6/24/94 for [64-1] motion for Summary Judgment, reset to 6/24/94 for [62-1] motion for Summary Judgment (signed by Judge Wilkes C. Robinson) Copy to parties. (ds) [Entry date 06/23/94]
6/24/94	86	REPLY by USA to response to [62-1] motion for Summary Judgment. Service: 6/24/94. (hw) [Entry date 06/27/94]
6/27/94	—	REPLY by CONOCO, INC. to response to [62-1] motion for Summary Judgment filed by leave of Judge. Service: 6/24/94. (as) [Entry date 06/29/94]
6/27/94	88	MOTION by USA (Service: 6/27/94) for Leave to File a corrected brief Response due: 7/14/94 (rs) [Entry date 06/29/94]
6/27/94	89	REPLY by CONOCO, INC. to response to [62-1] motion for Summary Judgment filed by leave of the judge. Service: 6/24/94 (mm) [Entry date 06/30/94]
6/27/94	90	REPLY by OXY USA INC., AMERADA HESS CORP., PENNZOIL EXPLORATION, UNION OIL COMPANY, CHEVRON USA INC., MARATHON OIL COMPANY, MURPHY EXPLORATION, MURPHY OIL USA, INC., AMOCO PRODUCTION to response to [62-1] motion for Summary Judgment filed by leave of the judge. Service: 6/24/94 (mm) [Entry date 06/30/94]
6/30/94	91	AMENDED ANSWER to Complaint by USA asserting offset claims: Service: 6/30/94 (rs) [Entry date 07/05/94]

DATE	NO.	PROCEEDINGS
7/5/94	92	ORDER granting [88-1] motion for Leave to File a corrected brief (signed by Judge Wilkes C. Robinson) Copy to parties. (rs) [Entry date 07/08/94]
7/5/94	93	CORRECTED REPLY BRIEF by USA to response to [62-1] motion for Summary Judgment. Service: 7/5/94 (rs) [Entry date 07/08/94]
7/8/94	94	SECOND AMENDED ANSWER to Complaint by USA: amends [91-1] answer by USA. Service: 7/8/94 (as) [Entry date 07/14/94]
7/29/94	100	RESPONSE by CONOCO, INC. to [91-1] answer by USA Service: 7/29/94 (rs) [Entry date 08/05/94]
8/1/94	95	RESPONSE by SHELL OFFSHORE, INC. to [94-1] answer by USA. Service: 8/1/94 (as) [Entry date 08/05/94]
8/1/94	96	RESPONSE by SHELL WESTERN E & P and SHELL FRONTIER OIL to [94-1] ansfer by USA. Service: 8/1/94 (as) [Entry date 08/05/94]
8/1/94	97	RESPONSE by OXY USA INC. to [94-1] answer by USA. Service: 8/1/94 (as) [Entry date 08/05/94]
8/1/94	98	RESPONSE by AMOCO PRODUCTION to [94-1] answer by USA. Service: 8/1/94 (as) [Entry date 08/05/94]
8/1/94	99	RESPONSE by MARATHON OIL COMPANY to [94-1] answer by USA. Service: 8/1/94 (as) [Entry date 08/05/94]
12/2/94	101	ORDER oral argument set for 10:00 1/31/95 for [66-1] motion for Partial Summary Judgment, [64-1] motion for Summary Judg-

DATE	NO.	PROCEEDINGS
		ment, [62-1] motion for Summary Judgment (signed by Judge Wilkes C. Robinson) Copy to parties. (rs) [Entry date 12/07/94]
12/23/94	102	MOTION by USA (Service: 12/23/94) for Leave to File a supplementary brief, etc. Response due: 1/9/95 (Supplemental brief included in motion for leave) (mp) [Entry date 12/30/94] [Edit date 01/23/95]
1/20/95	103	MOTION by OXY USA INC., AMERADA HESS CORP., PENNZOIL EXPLORATION, UNION OIL COMPANY, CHEVRON USA INC., MARATHON OIL COMPANY, MURPHY EXPLORATION, MURPHY OIL USA, INC., AMOCO PRODUCTION (Service: 1/20/95) for Leave to File a reply to defendant's supplemental brief Response due: 2/6/95 (mp) [Entry date 01/24/95]
1/20/95	104	ORDER granting [102-1] motion for Leave to File a supplementary brief, etc. (signed by Judge Wilkes C. Robinson) Copy to parties. (hw) [Entry date 01/25/95]
1/20/95	109	SUPPLEMENTAL PROPOSED FINDINGS of Uncontroverted Fact by USA. Service: 12/23/94 (mp) [Entry date 02/09/95]
1/26/95	105	MOTION by CONOCO, INC. and OXY USA INC., et al. (Service BY HAND: 1/26/95) for Leave to File notice of recent appellate opinions. Response due: 2/9/95 (as) [Entry date 01/31/95]
1/27/95	106	ORDER entered granting [103-1] motion for Leave to File a reply to defendant's supplemental brief (signed by Judge Wilkes C. Robinson) Copy to parties. (mp) [Entry date 02/01/95]

DATE	NO.	PROCEEDINGS
1/27/95	107	REPLY by OXY USA INC., AMERADA HESS CORP., PENNZOIL EXPLORATION, UNION OIL COMPANY, CHEVRON USA INC., MARATHON OIL COMPANY, MURPHY EXPLORATION, MURPHY OIL USA, INC., AMOCO PRODUCTION to response to [102-1] motion for Leave to File a supplementary brief, etc. Service: copy to defendant and plaintiff (mp) [Entry date 02/01/95]
1/30/95	108	MOTION by CONOCO, INC. (Service by hand: 1/30/95) for Leave to File a reply to defendant's supplementary brief and CONOCO's reply. Response due: 2/13/95 (hw) [Entry date 02/02/95]
1/31/95	—	Oral Argument held re: [66-1] motion for Partial Summary Judgment by AMERADA HESS CORP. (Transcript due 3/2/95), [64-1] motion for Summary Judgment by CONOCO, INC. (Transcript 3/2/95), [62-1] motion for Summary Judgment by USA (Transcript due 3/2/95) (mp) [Entry date 02/01/95]
2/9/95	110	TRANSCRIPT of proceedings re:, 1 volume, at Washington, D.C., for date of January 31, 1995. Notice to parties. (mp) [Entry date 02/10/95]
2/13/95	111	ORDER entered granting [105-1] motion for Leave to File notice of recent appellate opinions (signed by Judge Wilkes C. Robinson) Copy to parties. (mp) [Entry date 02/17/95]
2/13/95	112	NOTICE of recent applelate opinions by CONOCO, INC., OXY USA INC., AMERADA HESS CORP., PENNZOIL EXPLORATION, UNION OIL COMPANY, CHEV-

DATE	NO.	PROCEEDINGS
		RON USA INC., MARATHON OIL COMPANY, MURPHY EXPLORATION, MURPHY OIL USA, INC., AMOCO PRODUCTION Service: 1/26/95 (mp) [Entry date 02/17/95]
3/8/95	113	MOTION by CONOCO, INC., AMERADA HESS CORP. (Service: 3/8/95) for Leave to File notice of recent Appellate Opinion. Response due: 3/27/95 (hw) [Entry date 03/13/95]
3/21/95	114	RESPONSE by USA (Service: 3/21/95) to [113-1] motion for Leave to File notice of recent Appellate Opinion, [108-1] motion for Leave to File a reply to defendant's supplementary brief and CONOCO's reply, [105-1] motion for Leave to File notice of recent appellate opinions Reply due: 4/3/95 (mp) [Entry date 03/23/95]
3/21/95	115	ORDER entered granting [113-1] motion for Leave to File notice of recent Appellate Opinion (signed by Judge Wilkes C. Robinson) Copy to parties. (mp) [Entry date 03/23/95]
3/21/95	116	NOTICE of recent Appellate Opinion by CONOCO, INC. Service: to plaintiff counsel. (mp) [Entry date 03/23/95]
3/27/95	117	ORDER entred [sic] granting [114-1] motion response (signed by Judge Wilkes C. Robinson). Copy to parties. (mp) [Entry date 03/30/95]
4/3/95	118	MOTION by CONOCO, INC., OXY USA INC., et al. (Service BY HAND: 4/3/95) for Leave to File reply to Defendant's post argument submission. Response due: 4/17/95 (as) [Entry date 04/05/95]

DATE	NO.	PROCEEDINGS
4/6/95	119	ORDER granting [118-1] motion for Leave to File reply to Defendant's post argument submission (signed by Judge Wilkes C. Robinson). Copy to parties. (ss) [Entry date 04/10/95]
4/11/95	120	MOTION by USA (Service: 4/11/95) to Suspend the issuance of a decision by the court on the parties motions for summary judgment Response due: 4/28/95 (mp) [Entry date 04/13/95]
4/17/95	121	RESPONSE by OXY USA INC., AMERADA HESS CORP., et al. (Service: 4/17/95) to [120-1] motion to Suspend the issuance of a decision by the court on the parties motions for summary judgment. Reply due: 5/1/95 (as) [Entry date 04/19/95]
4/17/95	122	RESPONSE by CONOCO, INC. (Service BY HAND: 4/17/95) to [120-1] motion to Suspend the issuance of a decision by the court the parties motions for summary judgment. Reply due: 4/26/95 (as) [Entry date 04/19/95]
4/18/95	123	MOTION by SHELL WESTERN E & P, SHELL OFFSHORE INC., SHELL FRONTIER OIL (Service: 4/18/95) to substitute attorney (consented) Terminated attorney E. Edward Bruce for SHELL FRONTIER OIL, attorney E. Edward Bruce for SHELL OFFSHORE INC., attorney E. Edward Bruce for SHELL WESTERN E & P Added Michael E. Coney. (mp) [Entry date 04/20/95]
4/18/95	124	JOINT MOTION by SHELL WESTERN E & P, SHELL OFFSHORE INC., SHELL FRONTIER OIL to Dismiss (mp) [Entry date 04/20/95]

DATE	NO.	PROCEEDINGS
4/21/95	125	UNPUBLISHED DECISION granting [124-1] joint motion to Dismiss (signed by Judge Wilkes C. Robinson). Copy to parties. (as)
4/26/95	126	REPLY by USA to response to [120-1] motion to Suspend the issuance of a decision by the court on the parties motions for summary judgment. Service: 4/26/95 (as) [Entry date 05/01/95]
5/1/95	127	ORDER denying [120-1] motion to Suspend the issuance of a decision by the court on the parties motions for summary judgment (signed by Judge Wilkes C. Robinson). Copy to parties. (as) [Entry date 05/03/95]
5/1/95	128	MOTION by AMERADA HESS CORP., PENNZOIL EXPLORATION, UNION OIL COMPANY, CHEVRON USA INC., MARATHON OIL COMPANY, MURPHY EXPLORATION, MURPHY OIL USA, INC., AMOCO PRODUCTION, TEXACO INC., MOBIL OIL CORP., MOBIL OIL EXPLOR, SHELL WESTERN E & P, SHELL OFFSHORE INC., TEXACO EXPLORATION, SHELL FRONTIER OIL, MOBIL EXPL & PRODUC, MOBIL EXPLORATION (Service: 5/1/95) for Leave to File surreply memorandum. Response due: 5/18/95. (as) [Entry date 05/03/95]
5/4/95	129	ORDER granting [128-1] motion for Leave to File surreply memorandum (signed by Judge Wilkes C. Robinson) Copy to parties. (hw) [Entry date 05/08/95]
5/4/95	130	SURREPLY MEMORANDUM by CONOCO, INC., AMERADA HESS CORP., PENNZOIL EXPLORATION, UNION OIL COMPANY, CHEVRON USA INC., MARATHON OIL COMPANY, MURPHY EXPLORATION, MURPHY OIL USA, INC., AMOCO PRODUCTION re: [126-1] motion reply by USA Service: 5/4/95 (hw) [Entry date 05/08/95]

DATE	NO.	PROCEEDINGS
6/20/95	131	MOTION by OXY USA INC. (Service: 6/19/95) to substitute attorney (consented) Terminated attorney E. Edward Bruce for OXY USA INC. Added Thomas Lee Byers. (mp) [Entry date 06/22/95]
6/20/95	132	JOINT MOTION by USA, OXY USA INC. to Dismiss (mp) [Entry date 06/22/95]
6/23/95	133	ORDER granting [132-1] joint motion to Dismiss (signed by Judge Wilkes C. Robinson) Copy to parties. (ds) [Entry date 06/26/95]
6/23/95	134	JUDGMENT entered pursuant to Rule 54(b) dismissing, with prejudice, all the claims and complaints of OXY USA, Inc., related to the North Carolina and Florida leases, and also dismissing, without prejudice, the offset claim of the United States (signed by Clerk). Copy to parties. (tw) [Entry date 07/05/95]
7/7/95	135	MOTION by SHELL WESTERN E & P, SHELL OFFSHORE INC., SHELL FRONTIER OIL (Service: 7/7/95) to substitute attorney (consented) Terminated attorney Michael E. Coney for SHELL FRONTIER OIL, SHELL OFFSHORE INC., and SHELL WESTERN E & P Added E. Edward Bruce. (ds) [Entry date 07/17/95]

DATE	NO.	PROCEEDINGS
7/14/95	136	MOTION by USA (Service: 7/14/95) for Leave to File joint notification of settlement discussions, and notice. Response due: 7/31/95. (hw) [Entry date 07/18/95]
7/19/95	137	MOTION by USA (Service: 7/19/95) for Leave to File additional joint notification of progress of settlement discussions. (as) [Entry date 07/21/95]
7/19/95	138	ORDER granting [136-1] motion for Leave to File joint notification of settlement discussions, and notice (signed by Judge Wilkes C. Robinson). Copy to parties. (mp) [Entry date 07/24/95]
7/21/95	139	ORDER granting [137-1] motion for Leave to File additional joint notification of progress of settlement discussions (signed by Judge Wilkes C. Robinson) Copy to parties. (hw) [Entry date 07/25/95]
7/28/95	140	Stipulation by PENNZOIL EXPLORATION, UNION OIL COMPANY, CHEVRON USA INC., MURPHY EXPLORATION, MURPHY OIL USA, INC., AMOCO PRODUCTION, TEXACO INC., MOBIL OIL CORP., MOBIL OIL EXPLOR, TEXACO EXPLORATION and USA of agreement for judgment entry. (as) [Entry date 08/01/95]
7/28/95	141	JOINT MOTION by USA and SHELL OFFSHORE INC. to Dismiss. (as) [Entry date 08/01/95]
7/31/95	142	MOTION by AMERADA HESS CORP. (Service BY HAND: 7/31/95) for Leave to File memorandum re: litigation status. Response due: 8/14/95 (as) [Entry date 08/04/95]

DATE	NO.	PROCEEDINGS
7/31/95	143	MOTION by AMERADA HESS CORP. (Service: 7/31/95) for Leave to File proposed order. (ss) [Entry date 08/04/95]
8/1/95	144	Stipulation by CONOCO, INC. and USA of agreement for judgment's entry. (as) [Entry date 08/04/95]
8/7/95	145	UNPUBLISHED DECISION granting [144-1] stipulation and directing Clerk to enter judgment accordingly (signed by Judge Wilkes C. Robinson). Copy to parties. (as) [Entry date 08/08/95]
8/7/95	146	ORDER granting [141-1] joint motion to Dismiss (signed by Judge Wilkes C. Robinson). The Clerk is directed to dismiss with prejudice the claims specifically listed on the 7/28/95 joint motion to dismiss. Copy to parties. (ss) [Entry date 08/09/95]
8/7/95	147	ORDER granting [140-1] stipulation. The Clerk is directed to enter judgment according to the 7/28/95 stipulation (signed by Judge Wilkes C. Robinson). Copy to parties. (ss) [Entry date 08/09/95]
8/7/95	148	ORDER granting [142-1] motion for Leave to File memorandum re: litigation status (signed by Judge Wilkes C. Robinson). Copy to parties. (ss) [Entry date 08/09/95]
8/8/95	149	ORDER granting [143-1] motion for Leave to File proposed order (signed by Judge Wilkes C. Robinson). Copy to parties. (ss) [Entry date 08/09/95]
8/8/95	150	JUDGMENT entered pursuant to Rule 54(b) awarding third-party plaintiffs the sums as set forth in the July 28, 1995, stipulation for

DATE	NO.	PROCEEDINGS
		compromise settlement and entry of final judgment under RUSCFC 54(b). (See stipulation in file) (signed by Clerk). Copy to parties. (tw) [Entry date 08/10/95]
8/8/95	153	CERTIFIED TRANSCRIPT OF JUDGMENT awarding the third-party plaintiffs picked up by John Stephan this date. (See letter of authorization from attorney of record in file.) (tw) [Entry date 08/15/95]
8/9/95	151	JUDGMENT entered pursuant to Rule 54(b) dismissing, with prejudice, all the remaining claims related to the interest of Shell Offshore Inc. ("SOI"), which were excluded from the Court's order of April 21, 1995, specifically those which relate to SOI's interests in the leases as listed in the July 28, 1995, joint motion to dismiss. (See stipulation in file.) (signed by Clerk). Copy to parties. (tw) [Entry date 08/10/95]
8/10/95	152	JUDGMENT entered pursuant to Rule 58 awarding plaintiff, Conoco Inc., the sum of $16,917,413.34 in complete adjudication of all the claims of Conoco Inc. that are the subject of this case. If said amount is not paid within forty (40) days after the date hereof, it shall bear interest dating from the date hereof until payment under the rate specified in 41 U.S.C. ss 611. Payment of said Judgment shall be made to Conoco by wire transfer of immediately available funds to: Morgan Guaranty Trust Company, 60 Wall Street, New York, New York, ABA No. 023100238, Account No. 7341-00-006 (Conoco Inc.). The offset claims of the United States as made in its Amended Answer dated January 14, 1994, are hereby dismissed without prejudice (signed by Clerk). Copy to parties. (tw)

DATE	NO.	PROCEEDINGS
8/10/95	154	CERTIFIED TRANSCRIPT OF JUDGMENT forwarded to attorney of record. See letter in file. (tw) [Entry date 09/05/95]
9/7/95	155	MOTION by AMERADA HESS CORP. (Service BY HAND: 9/7/95) for Leave to File appellate opinion. Response due: 9/21/95 (as) [Entry date 09/11/95]
9/11/95	156	MOTION by USA (Service: 9/11/95) for Leave to File response (by September 29, 1995) regarding recent appellate opinion (WINSTAR). Response due: 9/28/95. (hw) [Entry date 09/14/95]
9/14/95	157	RESPONSE by CONOCO, INC. (Service: 9/14/95 by hand) to [156-1] motion for Leave to File response (by September 29, 1995) regarding recent appellate opinion (WINSTAR). Reply due: 9/25/95 (ss) [Entry date 09/19/95]
9/18/95	158	ORDER granting [155-1] motion for Leave to File appellate opinion (signed by Judge Wilkes C. Robinson). Copy to parties. (as) [Entry date 09/20/95]
9/18/95	159	ORDER granting [156-1] motion for Leave to File response (by September 29, 1995) regarding recent appellate opinion (WINSTAR) (signed by Judge Wilkes C. Robinson). Copy to parties. (as) [Entry date 09/20/95]
9/29/95	160	MEMORANDUM by USA re: [159-1] order [effects of Appeals decision in Winstar]. Service: 9/29/95 (as) [Entry date 10/04/95]

DATE	NO.	PROCEEDINGS
10/5/95	161	RESPONSE by CONOCO, INC. to [160-1] memorandum by USA [filed by leave of the Judge]. Service: 10/2/95. (hw) [Entry date 10/11/95]
11/3/95	162	G.A.O. Certificate of Settlement Number: Z-2897391, Dated: August 23, 1995 in the Amount: $2,249,818.00 was Paid by Treasury Dept.: August 25, 1995. (as) [Entry date 11/09/95]
11/3/95	163	G.A.O. Certificate of Settlement Number: Z-2897391, Dated: August 23, 1995 in the Amount: $20,038,839.00 was Paid by Treasury Dept.: August 25, 1995 (as) [Entry date 11/09/95]
11/3/95	164	G.A.O. Certificate of Settlement Number: Z-2897391, Dated: August 23, 1995 in the Amount: $65,085,621.00 was Paid by Treasury Dept.: August 25, 1995. (as) [Entry date 11/09/95]
11/3/95	165	G.A.O. Certificate of Settlement Number: Z-2897391, Dated: August 23, 1995 in the Amount: $37,924,432.00 was Paid by Treasury Dept.: August 25, 1995. (as) [Entry date 11/09/95]
11/3/95	166	G.A.O. Certificate of Settlement Number: Z-2897391, Dated: August 23, 1995 in the Amount: $2,844,123.00 was paid by Treasury Dept.: August 25, 1995. (as) [Entry date 11/09/95]
11/3/95	167	G.A.O. Certificate of Settlement Number: Z-2897391, Dated: August 23, 1995 in the Amount: $4,085,402.00 was Paid by Treasury Dept.: August 25, 1995. (as) [Entry date 11/09/95]

DATE	NO.	PROCEEDINGS
11/3/95	168	G.A.O. Certificate of Settlement Number: Z-2897391, Dated: August 23, 1995 in the Amount: $8,681,909.00 was Paid by Treasury Dept.: August 25, 1995. (as) [Entry date 11/09/95]
11/3/95	169	G.AO. Certificate of Settlement Number: Z-2897391, Dated: August 23, 1995 in the Amount: $34,089, 856.00 was Paid by Treasury Dept.: August 25, 1995. (as) [Entry date 11/09/95]
11/3/95	170	G.A.O. Certificate of Settlement Number: Z-2897391, Dated: August 23, 1995 in the Amount: $16,917,413.34 was Paid by Treasury Dept.: August 25, 1995. (as) [Entry date 11/09/95]
12/12/95	171	MOTION by USA (Service: 12/12/95) for Leave to File additional commentary on Winstar. Response due: 12/29/95 (as) [Entry date 12/14/95]
1/2/96	172	RESPONSE by CONOCO, INC. (Service: 12/20/95) to [171-1] motion for Leave to File additional commentary on Winstar. (Filed by leave of the Judge), Reply due: 1/5/96 (st) [Entry date 01/05/96]
1/24/96	173	MOTION by USA (Service : 1/24/96) for Leave to File joint notification of progress of settlement discussions, and notices. Response due: 2/12/96. (hw) [Entry date 01/31/96]
1/29/96	174	MOTION by USA (Service : 1/29/96) for Leave to File reply to response to its supplemental report, (by leave of the Judge). Response due: 2/12/96. (hw) [Entry date 02/05/96]

DATE	NO.	PROCEEDINGS
1/31/96	175	ORDER granting [173-1] motion for Leave to File joint notification of progress of settlement discussions and notices (signed by Judge Wilkes C. Robinson). Copy to parties. (as) [Entry date 02/07/96]
2/8/96	176	RESPONSE by AMERADA HESS CORP., MARATHON OIL COMPANY, MOBIL OIL CORP. and MOBIL EXPL & PRODUC (Service: 1/31/96) to [173-1] motion for Leave to File joint notification of progress of settlement discussions and notices by leave of the Judge. (as) [Entry date 02/13/96]
3/6/96	177	MOTION by USA (Service : 3/6/96) for Leave to File joint notification of progress of settlement discussions, and notice, (hw) [Entry date 03/11/96]
3/14/96	178	PUBLISHED DECISION granting [66-1] motion for Partial Summary Judgment, granting [64-1] motion for Summary Judgment and denying [62-1] motion for Summary Judgment (signed by Judge Wilkes C. Robinson). Copy to parties. (as) [Entry date 03/21/96]
3/26/96	179	MOTION by USA (Service : 3/26/96) for Reconsideration/Rehearing Pursuant to Rule 59 re: [178-1] order. (ss) [Entry date 04/01/96]
4/1/96	180	ORDER Response to [179-1] motion for Reconsideration/Rehearing Pursuant to Rule 59 re: [178-1] order reset to 4/15/96 (signed by Judge Wilkes C. Robinson). Copy to parties. (as) [Entry date 04/04/96]
4/1/96	181	PUBLISHED DECISION granting [66-1] motion for Partial Summary Judgment on breach of contract claims, denying [62-1]

DATE	NO.	PROCEEDINGS
		motion for Summary Judgment and for summary judgment on the Fifth Amendment taking issue and Withdrawing and substituting [178-1] order with said decision (signed by Wilkes C. Robinson). Copy to parties. (as) [Entry date 04/04/96]
4/15/96	182	RESPONSE by AMERADA HESS CORP. (Service: 4/15/96) to [179-1] motion for Reconsideration/Rehearing Pursuant to Rule 59 re: [178-1] order. (ss) [Entry date 04/18/96]
4/19/96	183	MOTION by AMERADA HESS CORP. (Service : 4/19/96) for entry of final judgment. Response due: 5/6/96 (ss) [Entry date 04/24/96]
4/26/96	184	ORDER denying [179-1] motion for Reconsideration/Rehearing Pursuant to Rule 59 re: [178-1] order (signed by Judge Wilkes C. Robinson). Copy to parties. (as) [Entry date 05/01/96]
5/1/96	185	MOTION by USA (Service: 5/1/96) to Strike [183-1] motion for entry of final judgment by AMERADA HESS CORP., or in the alternative to Stay consideration of that motion until after the status conference specified by the court in its 3/14/96 decision is held, or in the alternative to Extend Time to respond to motion requests extension of 28 days from the date of the order. Response date: 5/20/96. (st) [Entry date 05/06/96] [Edit date 05/06/96]
5/3/96	186	RESPONSE by CONOCO, INC. (Service: 5/3/96) to [185-1] motion to Strike [183-1] motion for entry of final judgment by AMERADA HESS CORP. Reply due: 5/15/96 (ss) [Entry date 05/08/96]

DATE	NO.	PROCEEDINGS
5/7/86	187	ORDER returning defendant's motion for leave to file a reply to plaintiff's response to defendant's motion for reconsideration [moot] (signed by Judge Wilkes C. Robinson). Copy to parties. (as) [Entry date 05/10/96]
5/9/96	188	ORDER scheduling Status Conference for 10:00am, 5/16/96 (signed by Judge Wilkes C. Robinson) Copy to parties. (hw) [Entry date 05/14/96]
5/9/96	189	ORDER denying [183-1] motion for entry of final judgment. The court shall proceed with a formal status conference, to be scheduled (signed by Judge Wilkes C. Robinson). Copy to parties. (ss) [Entry date 05/14/96]
5/16/96	190	ORDER set joint Status Report deadline to 6/17/96 and set third party plaintiff's Motion Filing deadline to 6/24/96 (signed by Judge C. Robinson). Copy to parties. (as) [Entry date 05/20/96]
5/16/96	—	Status Conference held. (Transcript due 6/17/96) (ss) [Entry date 05/21/96]
5/23/96	191	TRANSCRIPT of proceedings re: 1 volume, at Washington, D.C., for date of May 16, 1996. Notice to parties. (ss) [Entry date 05/29/96]
6/14/96	192	MOTION by OXY USA INC., AMERADA HESS CORP., PENNZOIL EXPLORATION, UNION OIL COMPANY, CHEVRON USA INC., MARATHON OIL COMPANY, MURPHY EXPLORATION, MURPHY OIL USA, INC., AMOCO PRODUCTION, SHELL OFFSHORE INC., TEXACO EXPLORATION, SHELL FRONTIER OIL, MOBIL EXPL & PRODUC, MOBIL EXPLORA-

DATE	NO.	PROCEEDINGS
		TION (Service: 6/14/96) to Extend Time to file a motion of reconsideration until 7/8/96. Response due: 7/1/96 (st) [Entry date 06/18/96]
6/18/96	193	ORDER granting [192-1] motion to Extend Time to file a motion of reconsideration, reset Status Report deadline to 7/1/96 and reset Motion Filing deadline to 7/8/96 (signed by Judge Wilkes C. Robinson). Copy to parties. (as) [Entry date 06/20/96]
6/27/96	197	NOTICE of change of address by Mark Arnold Melnick □ (rs) [Entry date 07/11/96]
6/28/96	194	MOTION by CONOCO, INC. (Service : 6/28/96) to Extend Time Response due: 7/15/96 (hw) [Entry date 07/03/96]
6/28/96	195	MOTION by CONOCO, INC. and AMERADA HESS CORP., et al. (Service: 6/28/96) to Extend Time within which to file a joint status report and proposal for further proceedings [until 7/15/96]. (tw) [Entry date 07/03/96]
7/2/96	196	ORDER granting [195-1] motion to Extend Time within which to file a joint status report and proposal for further proceedings, reset Status Report deadline to 7/8/96 and reset Motion Filing deadline to 7/15/96 (signed by Judge Wilkes C. Robinson). Copy to parties. (as) [Entry date 07/10/96]
7/5/96	198	MOTION by USA (Service: 7/5/96) to Extend Time to file proposed schedules for further proceedings until 7/10/96. Response due: 7/22/96 (st) [Entry date 07/11/96]
7/10/96	199	Joint STATUS REPORT by USA, AMERADA HESS CORP., PENNZOIL EXPLORATION, UNION OIL COMPANY, CHEV-

DATE	NO.	PROCEEDINGS
		RON USA INC., MARATHON OIL COMPANY, MURPHY EXPLORATION, MURPHY OIL USA, INC., AMOCO PRODUCTION, TEXACO INC., MOBIL OIL CORP., MOBIL OIL EXPLOR, SHELL WESTERN E & P, SHELL OFFSHORE INC., TEXACO EXPLORATION, SHELL FRONTIER OIL, MOBIL EXPL & PRODUC and MOBIL EXPLORATION. Service: 7/10/96. (hw) [Entry date 07/15/96]
7/10/96	200	MOTION by AMERADA HESS CORP., UNION OIL COMPANY, CHEVRON USA INC., MARATHON OIL COMPANY, MURPHY EXPLORATION, AMOCO PRODUCTION, MOBIL EXPL & PRODUC (Service: 7/10/96) For reconsideration of [189-1] order under Rule 83.2. (as) [Entry date 07/15/96]
7/17/96	201	ORDER Response to [200-1] motion For reconsideration of [189-1] order under Rule 83.2 set to 7/31/96 (signed by Judge Wilkes C. Robinson). Copy to parties. (as) [Entry date 07/19/96]
7/30/96	202	MOTION by USA (Service : 7/30/96) to Extend Time within which to respond to motion for reconsideration, (until August 6, 1996). Response due: 8/16/96. (hw) [Entry date 08/05/96]
8/1/96	203	ORDER granting [202-1] motion to Extend Time within which to respond to motion for reconsideration and Response to [200-1] motion For reconsideration of [189-1] order under Rule 83.2 reset to 8/6/96 (signed by Judge Wilkes C. Robinson). Copy to parties. (as) [Entry date 08/07/96]

DATE	NO.	PROCEEDINGS
8/6/96	204	RESPONSE by USA (Service: 8/6/96) to [200-1] motion For reconsideration of [189-1] order under Rule 83.2. Reply due: 8/19/96 (ss) [Entry date 08/12/96]
8/20/96	205	REPLY by OXY USA INC., et al. to response to [200-1] motion For reconsideration of [189-1] order under Rule 83.2 by leave of the Judge. Service: 8/15/96 (as) [Entry date 08/26/96]
9/6/96	206	ORDER denying [200-1] motion For reconsideration of [189-1] order under Rule 83.2. The parties shall file a joint proposed schedule for further proceedings within thirty days (signed by Judge Wilkes C. Robinson). Copy to parties. (hw) [Entry date 09/14/96]
9/24/96	207	Stipulation by USA, UNION OIL COMPANY, CHEVRON USA INC., MURPHY EXPLORATION, MURPHY OIL USA, INC., AMOCO PRODUCTION of settlement and compromise. (as) [Entry date 09/30/96]
10/2/96	208	UNPUBLISHED DECISION (signed by Judge Wilkes C. Robinson). Copy to parties. (as) [Entry date 10/04/96]
10/3/96	209	PARTIAL JUDGMENT entered pursuant to Rule 58, that third party plaintiff, Amoco Production Company shall recover of and from the United States the sum of $3,603,-874.00 payable by wire to Chase Manhattan Bank, New York, NY, ABA #021000021, for credit to Amoco Production Company, Account #9102499747; that third party plaintiff, Chevron U.S.A. Inc., shall recover of and from the United States the sum of $23,496,100.00 payable by wire to First National Bank of Chicago, Ilinois, ABA #071-000013, for credit to Chevron U.S.A. Oil & Gas, Account # 59-51704; that third party

DATE	NO.	PROCEEDINGS
		plaintiff, Murphy Exploration Production Company shall recover of and from the United States the sum of $2,656,584.00 payable by wire to First National Bank of El Dorado, Arkansas, ABA #082900911, for credit to Murphy Exploration & Production Company, Account #472884 and third party plaintiff, Union Oil Company of California shall recover of and from the United States the sum of $11,865,803.00 payable by wire to Northern Trust Co., Chicago, Illinois, ABA #071000152, for credit to Union Oil Company of California, Account #247731. The judgment entered herein shall bear interest, dating from sixty (60) days from the date that is is submitted by subject third party plaintiffs for payment until payment, under the rate specified in 41 U.S.C. Subsection 611 (signed by Clerk). Copy to parties. (as) [Entry date 10/07/96] [Edit date 10/07/96]
10/4/96	210	CERTIFIED TRANSCRIPT OF JUDGMENT picked up in person by attorney of record. See letter in file. (as) [Entry date 10/07/96]
10/7/96	211	Joint Additional Documentation [proposed schedule for further proceedings]. (as) [Entry date 10/09/96]
10/8/96	212	ORDER set Joint Proposed Discovery deadline to 10/28/96 (signed by Judge Wilkes C. Robinson). Copy to parties. (as) [Entry date 10/09/96]
10/28/96	213	Additional Documentation [joint proposal for scheduling]. (as) [Entry date 11/05/96]
11/8/96	214	Stipulation of agreement pursuant to RUSCFC 54(b). (as) [Entry date 11/13/96]

DATE	NO.	PROCEEDINGS
11/13/96	215	UNPUBLISHED DECISION (signed by Judge Wilkes C. Robinson). Copy to parties. (as) [Entry date 11/15/96]
11/14/96	216	SCHEDULING ORDER setting Pretrial Conference for 10:00 a.m. on 4/18/97; Third Party Plaintiff's Appendix G deadline on on 2/28/97 and 3/14/97, and expert witnesses list no later than 2/14/97; Defendant's Appendix G deadline on 4/11/97; Brief deadline set on 12/13/96 and Trial deadline set on 9:00 a.m. on 5/5/97 (by Judge Wilkes C. Robinson). Copy to parties. (as) [Entry date 11/19/96]
11/15/96	217	PARTIAL JUDGMENT entered pursuant to Rule 58 that third party plaintiff, Amerada Hess Corporation, recover of and from the United States the amount of $39,259,703.40. The judgment entered herein shall bear interest, dating from fifty (50) days from the date that it is submitted by subject third party plaintiff for payment until payment is made in full, under the rate specified in 41 U.S.C. subsection 611. Payment shall be made by wire to Chase Manhattan Bank, New York, New York, ABA #021000021, for credit to Amerada Hess Corporation Account #910-2-475200 (signed by Clerk). Copy to parties. (as) [Entry date 11/20/96]
11/18/96	218	CERTIFIED TRANSCRIPT OF JUDGMENT forwarded to attorney of record. See letter in file. (as) [Entry date 11/21/96]
12/16/96	219	MOTION by USA (Service : 12/16/96) to Amend [216-1] Scheduling order, re: enlarge time to depose witness to 1/31/97. Response due: 1/2/97. (hw) [Entry date 12/19/96]

DATE	NO.	PROCEEDINGS
12/23/96	220	ORDER granting [219-1] motion to Amend [216-1] Scheduling order (signed by Judge Wilkes C. Robinson). Copy to parties. (as) [Entry date 12/30/96]
1/3/97	221	MOTION by MOBIL EXPLORATION, MARATHON OIL COMPANY (Service BY HAND: 1/3/97) to Compel discovery, to Amend [216-1] Scheduling and for an immediate discovery conference. [Exhibit B PLACED IN CAMERA]. Response due: 1/17/97 (as) [Entry date 01/07/97] [Edit date 01/07/97]
2/5/97	222	MOTION by OXY USA INC., et al. (Service BY HAND: 2/5/97) for an immediate status conference. Response due: 2/19/97 (as) [Entry date 02/10/97]
2/10/97	223	MOTION by USA (Service : 2/10/97 By hand) to Amend [216-1] Scheduling order. Response due: 2/24/97 (ss) [Entry date 02/12/97]
2/13/97	224	ORDER reset Defendant's Appendix G deadline on 6/6/97, Plaintiff's Appendix G deadline on 4/4/97, reset Expert Report due: 3/28/97 for MOBIL EXPLORATION, reset Pretrial Conference for 6/13/97 and reset Trial for 6/23/97 (signed by Judge Wilkes C. Robinson). Copy to parties. (as) [Entry date 02/18/97]
2/18/97	225	ORDER mooting [221-1] motion to Compel discovery, mooting [221-2] motion to Amend [216-1] Scheduling and, mooting [221-3] motion (signed by Judge Wilkes C. Robinson). Copy to parties. (as) [Entry date 02/19/97]

DATE	NO.	PROCEEDINGS
2/19/97	227	Notice of reassignment to Judge James T. Turner. Copy to parties. (as) [Entry date 03/13/97]
2/26/97	226	ORDER granting [223-1] motion to Amend [216-1] Scheduling order amending captioned style, reset Trial for 10:00 a.m. on 7/21/97 and reset Pretrial Conference for 10:30 a.m. on 7/9/97 (signed by Judge Wilkes C. Robinson). Copy to parties. (as) [Entry date 03/04/97]
3/12/97	228	JOINT MOTION by USA, MARATHON OIL COMPANY to revise scheduling order, re: (1) Depositions of defendant's expert witnesses shall be taken on or before March 20, 1997; (2) Plaintiffs shall provide the expert report by April 3, 1997; (3) Plaintiffs shall file their final exhibit lists, witness list and memoranda of contentions of law and fact, etc., by April 10, 1997; (4) Depositions of plaintiffs' expert witnesses shall be taken on or before May 22, 1997; and (5) Defendant shall file its final exhibit lists, final witness list, and memoranda of contentions of law and fact with the court by June 12, 1997 (hw) [Entry date 03/17/97]
3/13/97	229	ORDER granting [228-1] joint motion to revise scheduling order, reset Expert Report due: 4/3/97 for MARATHON OIL COMPANY, reset Defendant's Appendix G deadline on 6/12/97, Plaintiff's Appendix G deadline on 4/10/97 (signed by Judge James T. Turner). Copy to parties. (as) [Entry date 03/18/97]
3/31/97	230	MOTION by USA (Service : 3/28/97) to waive certain requirements of RCFC Appendix G. (ss) [Entry date 04/10/97]

DATE	NO.	PROCEEDINGS
4/2/97	231	ORDER denying [230-1] motion to waive certain requirements of RCFC Appendix G (signed by Judge James T. Turner) Copy to parties. (hw) [Entry date 04/14/97]
4/10/97	232	Witness list by MARATHON OIL COMPANY and MOBIL OIL EXPLOR. Service: 4/10/97. (hw) [Entry date 04/21/97]
4/10/97	233	Exhibit list by MARATHON OIL COMPANY and MOBIL OIL EXPLOR Service: 4/10/97. (hw) [Entry date 04/21/97]
4/10/97	234	PRETRIAL MEMORANDUM by MARATHON OIL COMPANY. Service: 4/10/97. ☐ (hw) [Entry date 04/24/97]
4/10/97	235	MOTION by MARATHON OIL COMPANY, MOBIL OIL EXPLOR (Service : 4/10/97) to Correct caption. Response due: 4/28/97 (hw) [Entry date 04/25/97]
4/16/97	236	ORDER granting [235-1] motion to Correct caption. (signed by Judge James T. Turner). Copy to parties. (ds) [Entry date 04/30/97]
4/21/97	237	MOTION by MARATHON OIL COMPANY, MOBIL OIL EXPLOR (Service: 4/16/97 By Hand) for In-Person Status Conference and Response to Court's Letter 4/16/97. Response due: 5/5/97 (ss) [Entry date 05/02/97]
4/22/97	238	ORDER withdrawing [237-1] motion for In-Person Status Conference; and directing parties to file reports of experts on damages issues. (signed by Judge James T. Turner) Copy to parties. (ds) [Entry date 05/03/97]
4/23/97	239	Additional Documentation pursuant to Rule 16 and App G [appendicies prepared by plaintiffs' expert witnesses (exhibits A, B,

DATE	NO.	PROCEEDINGS
		and C three separate IN CAMERA EXHIBITS plus public notice)] filed by MARATHON OIL COMPANY, MOBIL OIL EXPLORATION and PLACED IN CAMERA this day. Service: 4/23/97 (rs) [Entry date 05/06/97]
6/6/97	240	MOTION by USA (Service : 6/6/97) to Extend Time to June 17, 1997, to file its exhibit list, witness list, and contentions of law and fact. Response due: 6/23/97 (cdc)
6/6/97	241	ORDER granting [240-1] motion to Extend Time to June 17, 1997, to file its exhibit list, witness list, and contentions of law and fact. (signed by Judge James T. Turner) Copy to parties. (cdc) [Entry date 06/16/97]
6/17/97	243	Witness list by USA. Service 6/17/97 (ab) [Entry date 06/23/97]
6/17/97	244	JOINT STATEMENT OF ISSUES OF FACT AND LAW (st) [Entry date 06/27/97]
6/17/97	245	PRETRIAL MEMORANDUM by USA Service: 6/17/97 ☐ (st) [Entry date 06/27/97]
6/17/97	246	Exhibit list by USA Service: 6/17/97 (st) [Entry date 06/27/97]
6/20/97	242	MOTION by USA (Service : 6/19/97) for Leave to File amended exhibit list. Response due: 7/7/97. (hw) [Entry date 06/23/97]
7/1/97	254	MOTION by MARATHON OIL COMPANY (Service by hand: 7/1/97) for Leave to File a response to defendant's memorandum of contentions of fact and law. Response due: 7/15/97 (ds) [Entry date 07/18/97]
7/2/97	250	MOTION by MARATHON OIL COMPANY, MOBIL OIL EXPLOR (Service : 7/2/97) in Limine to exclude certain testimony and evidence at trial. Response due: 7/21/97 (cdc) [Entry date 07/16/97]

DATE	NO.	PROCEEDINGS
7/3/97	256	MOTION by USA (Service : 7/3/97) for Leave to File transcripts of deposition testimony as substantive evidence. Response due: 7/21/97. (hw) [Entry date 07/21/97]
7/7/97	251	RESPONSE by USA, MARATHON OIL COMPANY to [245-1] memorandum by USA Service: 7/1/97 (cdc) [Entry date 07/17/97]
7/7/97	252	ORDER granting [242-1] motion for Leave to File amended exhibit list (signed by Judge James T. Turner) Copy to parties. (cdc) [Entry date 07/17/97]
7/7/97	253	Amended Exhibit list by USA Service: 6/20/97 (cdc) [Entry date 07/17/97]
7/7/97	257	ORDER granting [256-1] motion for Leave to File transcripts of deposition testimony as substantive evidence (signed by Judge James T. Turner) Copy to parties. (ds) [Entry date 07/22/97]
7/7/97	258	Deposition transcripts of James Martin, Paul H. Benson and Paul J. Hoenmans filed by defendant. (ds) [Entry date 07/22/97]
7/7/97	259	MOTION by USA (Service : 7/7/97) for Leave to File reply to response to memorandum of contentions of fact and law. Response due: 7/24/97 (ds) [Entry date 07/22/97]
7/7/97	260	RESPONSE by MARATHON OIL COMPANY, MOBIL OIL EXPLOR (Service by hand: 7/9/97) to [259-1] motion for Leave to File reply to response to memorandum of contentions of fact and law Reply due: 7/18/97. (ds) [Entry date 07/22/97]

DATE	NO.	PROCEEDINGS
7/8/97	247	RESPONSE by USA (SUPPLEMENT TO SUBMISSIONS FILED PURSUANT TO RCFC 16 AND APPENDIX G) Service: 7/7/97 Filed by leave of the Judge. (cdc) [Entry date 07/09/97]
7/8/97	263	RESPONSE by USA (Service: 7/8/97) to [250-1] motion in Limine to exclude certain testimony and evidence at trial. Reply due: 7/21/97 (ds) [Entry date 07/24/97]
7/8/97	264	ORDER granting [259-1] motion for Leave to File reply to response to memorandum of contentions of fact and law (signed by Judge James T. Turner) Copy to parties. (Reply was incorporated in motion for leave) (ds) [Entry date 07/24/97]
7/10/97	248	SUPPLEMENT TO MOTION in limine with attached Exh. A by MARATHON OIL COMPANY, MOBIL OIL EXPLOR (Service 7/8/97) Filed by leave of the Judge. FILED UNDER SEAL AND SUBJECT TO PROTECTIVE ORDER. in Limine Response due: 7/22/97 (cdc)
7/14/97	249	TRANSCRIPT of proceedings re: pretrial conference, 1 volume, at Washington D.C., for date of July 9, 1997. Notice to parties. (st) [Entry date 07/15/97]
7/17/97	255	STATUS REPORT by USA Service: 7/16/97 (cdc) [Entry date 07/18/97]
7/18/97	261	STATUS REPORT by USA, MARATHON OIL COMPANY, MOBIL OIL EXPLOR Service: 7/18/97 (cdc) [Entry date 07/22/97]
7/18/97	262	TRANSCRIPT of proceedings re: Pretrial Conference (continued), 1 volume, at Washington, D.C., for date of July 14, 1997. Notice to parties. (st) [Entry date 07/23/97]

DATE	NO.	PROCEEDINGS
7/18/97	265	UNPUBLISHED ORDER entered directing entry of partial judgment pursuant to Rule 54(b) stating that there is no just reason for delay, together with memorandum concerning final pre-trial conference, (signed by Judge James T. Turner). Copy to parties. (tw) [Entry date 07/25/97]
7/18/97	267	UNPUBLISHED ORDER directing entry of final judgment (signed by Judge James T. Turner). Copy to parties. (tw) [Entry date 07/25/97]
7/24/97	—	Case closed (tw) [Entry date 07/25/97]
7/24/97	266	Partial judgment entered on July 25, 1997, pursuant to Rule 58 in favor of plaintiff, MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC., in the amount of $78,257,565 VACATED PURSUANT TO THE ORDER OF MAY 28, 1999. (ds) [Entry date 06/01/99]
7/24/97	268	Judgment entered on July 25, 1997, pursuant to Rule 54 in favor of plaintiff, MARATHON OIL COMPANY, in the amount of $78,242,-368.59 VACATED PURSUANT TO THE ORDER OF MAY 28, 1999. (ds) [Entry date 06/01/99]
7/25/97	269	CERTIFIED TRANSCRIPT OF JUDGMENT forwarded to attorney of record. See letter in file. (tw) [Entry date 07/28/97]
7/25/97	270	CERTIFIED TRANSCRIPT OF JUDGMENT forwarded to attorney of record. See letter in file. (tw) [Entry date 07/28/97]
8/20/97	271	Bill of costs by MARATHON OIL COMPANY, MOBIL OIL EXPLOR Service: 8/20/97 (Objection to Bill of Costs due by 9/8/97) (cdc)

DATE	NO.	PROCEEDINGS
9/11/97	272	MOTION by USA (Service: 9/11/97) for Leave to File response to Cost Petition Response due: 9/29/97. (st) [Entry date 09/15/97]
9/12/97	273	ORDER granting [272-1] motion for Leave to File response to Cost Petition (signed by Judge James T. Turner) Copy to parties. (cdc) [Entry date 09/16/97]
9/12/97	275	OBPECTION (Reply due 9/25/97) by USA to [271-1] bill of costs by MOBIL OIL EXPLOR, MARATHON OIL COMPANY. Service: 9/11/97 (ds) [Entry date 09/25/97]
9/19/97	276	NOTICE OF APPEAL by USA. Copy to MARATHON OIL, etc., Judge Turner and to CAFC. Fee not required. (hw) [Entry date 09/22/97]
9/19/97	277	REPLY by MARATHON OIL COMPANY, MOBIL OIL EXPLOR to [275-1] objection to bill of costs by USA. Service: 9/18/97 (ds) [Entry date 09/25/97]
9/25/97	—	CAFC Case Number Re: [276-1] appeal by USA. CAFC NUMBER: 97-5146. (hw) [Entry date 09/29/97]
5/20/99	278	MANDATE (certified copy) from the CAFC, dated May 20, 1999, reversing the □ [266-1] and [268-1] judgments. (ds) [Entry date 06/01/99]
5/28/99	279	ORDER vacating [266-1] and [268-1] judgments and directing the entry of a new judgment in favor of defendant; and directing plaintiffs to return the certified transcripts of judgment forwarded on July 25, 1997. (signed by Judge James T. Turner) Copy to parties. (ds) [Entry date 06/01/99]

DATE	NO.	PROCEEDINGS
6/1/99	280	JUDGMENT entered pursuant to Rule 58, dismissing the complaints. Each party shall bear its own costs. [Vacated to the limited extent that is applies to Count III (alleging a Fifth Amendment taking) of Marathon's complaint filed on October 29, 1992. per Order dated Aug. 25, 1999.] (signed by Clerk). Copy to parties. (ds) [Edit date 08/26/99]
6/1/99	—	Case closed (ds)
6/7/99	281	CERTIFIED TRANSCRIPTS OF JUDGMENT dated July 24, 1997 returned to Clerk's Office by E. Edward Bruce, and destroyed this date. (ld) [Entry date 06/08/99]
6/8/99	282	MOTION by MARATHON OIL COMPANY (Service: 6/8/99) for Reconsideration/Rehearing Pursuant to Rule 59 re: [280-1] judgment order, and/or to alter or to Amend [280-1] judgment order. Response due: 6/21/99. (dw) [Entry date 06/11/99]
6/22/99	283	ORDER Defendant's response to [282-1] motion for Reconsideration/Rehearing Pursuant to Rule 59 re: [280-1] judgment order set to 7/9/99, [282-2] motion to Amend [280-1] judgment order set to 7/9/99. (signed by Judge James T. Turner) Copy to parties. (jt) [Entry date 06/23/99]
7/9/99	284	RESPONSE by USA (Service: 7/9/99) to [282-1] motion for Reconsideration/Rehearing Pursuant to Rule 59 re: [280-1] judgment order, [282-2] motion to Amend [280-1] judgment order. (jt) [Entry date 07/12/99]

DATE	NO.	PROCEEDINGS
7/22/99	285	REPLY by MARATHON OIL COMPANY to response to [282-1] motion for Reconsideration/Rehearing Pursuant to Rule 59 re: [280-1] judgment order, [282-2] motion to Amend [280-1] judgment order. Filed by leave of the Judge. Service: 7/16/99 (jt) [Entry date 07/23/99]
8/2/99	286	SURREPLY by USA to [282-1] motion for Reconsideration/Rehearing Pursuant to Rule 59 re: [280-1] judgment order by MARATHON OIL COMPANY, [282-2] motion to Amend [280-1] judgment order by MARATHON OIL COMPANY. Filed by leave of the Judge. Service: 7/29/99 (jt) [Entry date 08/03/99]
8/4/99	287	RESPONSE by MARATHON OIL COMPANY to [286-1] response by USA, by leave of the Judge. Service: 8/3/99. (dw)
8/9/99	288	ORDER oral argument set for 10:30 a.m. 8/18/99 for [282-1] motion for Reconsideration/Rehearing Pursuant to Rule 59 re: [280-1] judgment order, set for 10:30 a.m. 8/18/99 for [282-2] motion to Amend [280-1] judgment order (signed by Judge James T. Turner). Copy to parties. (dw) [Entry date 08/10/99]
8/18/99	—	Oral Argument re: [282-1] motion for Reconsideration/Rehearing Pursuant to Rule 59 re: [280-1] judgment order by MARATHON OIL COMPANY (Transcript due 9/17/99), [282-2] motion to Amend [280-1] judgment order by MARATHON OIL COMPANY (Transcript due 9/17/99) □ (ds) Entry date 08/20/99]
8/25/99	289	ORDER granting [282-1] motion for Reconsideration/Rehearing Pursuant to Rule 59

DATE	NO.	PROCEEDINGS
		re: [280-1] judgment order, granting [282-2] motion to Amend [280-1] judgment order. Accordingly, it is ordered that the judgment entered on June 1, 1999 in favor of the defendant and against both plaintiffs shall be vacated to the limited extent that it applied to Count III (alleging a fifth amendment taking) of Marathon's complaint filed on October 28, 1992. Inasmuch as the resulting judgment in favor of defendant and against Marathon constitutes a partial judgment, it is expressly determined, pursuant to RCFC 54(b), that there is no just reason to delay the partial judgment in favor of the government with respect to Counts I and II of Marathon's complaint. Further it is ordered that all proceedings in this matter are hereby suspended generally and shall remain suspended Staying until final action by the United States Supreme Court in response to any petition for writ of certiorari submitted by plaintiff Marathon in connection with the revised opinion of the Federal Circuit dated May 13, 1999 and its subsequent mandate issued on May 20, 1999. (signed by Judge James T. Turner) Copy to parties. (ld)
8/26/99	290	JUDGMENT entered, as provided for in Rule 54(b), in favor of the government with respect to Counts I and II of Marathon's complaint. Counts I and II of Marathon's complaint are dismissed. (signed by Clerk). Copy to parties. (ld)
8/26/99	—	Case reopened (ld)
9/17/99	291	TRANSCRIPT of proceedings 1 volume, at Washington, D.C., for date of August 18, 1999. Notice to parties. (st) [Entry date 09/21/99]

DATE	NO.	PROCEEDINGS
11/15/99	292	NOTICE of the Grant of Petition for Writ of Certiorari by MARATHON OIL COMPANY. Service: 11/15/99 (jt) [Entry date 11/17/99]

UNITED STATES COURT OF FEDERAL CLAIMS

No. 97-5146

MARATHON OIL CO.

v.

UNITED STATES OF AMERICA

DOCKET ENTRIES

DATE	PROCEEDINGS
10/3/97	CERTIFICATE OF INTEREST FOR THE APPELLEE(S), MARATHON OIL CO, MOBIL OIL EXPLO., PRODT. (MS-10/03/97) FILED: 10/03/97. (EOD 10/03/97 BY KKC) 97-5146
11/13/97	Appellant—MOTION FOR ENLARGEMENT OF TIME. (MS-11/13/97) FILED: 11/13/97. ON CONSENT. ACTION ON MOTION (3): GRANTED. BY CLERK. FILED: 11/21/97. (EOD 11/21/97 BY JB) THE BRIEF IS DUE ON 12/08/97. 97-5146
12/8/97	THE UNITED STATES [Appellant] - BRIEF FOR DEFENDANT-APPELLANT, THE UNITED STATES (MS-12/08/97). FILED: 12/08/97. [985354] (EOD 12/12/97 BY JLA) 97-5146
1/20/98	MARATHON OIL COMPANY, ET AL. [APPELLEES - BRIEF FOR PLAINTIFFS-APPELLEES (MS-01/20/98). FILED: 01/20/98. [985700] (EOD 01/22/98 BY JLA) 97-5146
1/30/98	Appellant - MOTION FOR 13 CALENDAR DAY ENLARGEMENT OF TIME TO FILE REPLY BRIEF. [NPF] (MS-01/30/98) FILED: 01/30/98. ACTION ON MOTION (5): MOTION GRANTED. BY CLERK. FILED: 02/27/98. (EOD 02/27/98 BY ETW) 97-5146

DATE	PROCEEDINGS
2/19/98	THE UNITED STATES [APPELLANT] - REPLY BRIEF FOR DEFENDANT-APPELLANT, THE UNITED STATES (MS-02/19/98). FILED: 02/27/98. [986032] (EOD 03/06/98 BY JLA) 97-5146
3/2/98	THE UNITED STATES [APPELLANT] - JOINT APPENDIX - TWO VOLUMES (MS-03/02/98). FILED: 03/02/98. ENTRY OF APPEARANCE NOTICE ISSUED. [986054] (EOD 03/09/98 BY JLA) 97-5146
3/23/98	NOTICE OF CALENDARING issued. Panel 980-5B on May 4, 1998
4/1/98	REVISED NOTICE OF CALENDARING ISSUED PANEL 05B ON MAY 4, 1998
5/4/98	Submitted after ORAL ARGUMENT by E. Edward Bruce and Mark A. Melnick. (NEWMAN, PLAGER and SCHALL)
5/8/98	Appellees - MOTION FOR LEAVE TO FILE A LETTER CORRECTING A MISSTATEMENT MADE BY COUNSEL FOR APPELLANT DURING THE REBUTTAL ARGUMENT. (LETTER ATTACHED) [NPF] (MS-05/08/98) RECEIVED: 05/08/98. REPLY 1 (9) FILED: 05/13/98. ACTION ON MOTION (10): LEAVE TO FILE IS GRANTED. BY MERITS PANEL. FILED: 05/20/98. (EOD 05/20/98 BY JB) 97-5146
10/15/98	REVERSED. PRECEDENTAL OPINION BY: J. PLAGER. DISSENTING OPINION BY: J. NEWMAN. JUDGMENT ENTERED: 10/15/98. COSTS AGAINST APPELLEE. (EOD 10/15/98 BY KSH) 97-5146
11/25/98	APPELLEE - COMBINED PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC (MS-11/25/98) FILED: 11/25/98

DATE	PROCEEDINGS
	PETITION CIRCULATED: 11/25/98 RESPONSE REQUESTED FROM: APPELLANT (U.S.) RESPONSE DUE: 01/12/99 RESPONSE FILED: 01/11/99 RESPONSE CIRCULATED: 01/11/99 PETITION: GRANTED ON 05/13/99. SUGGESTION CIRCULATED: 04/30/99 SUGGESTION: DECLINED ON 05/13/99. (EOD 05/13/99 BY AV) 97-5146 (Petition granted for the ltd. purpose of clarifying the opinion)
11/25/98	A.P.I. & I.P.A.A. - MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF. (MS-11/25/98) FILED: 11/27/98. ON CONSENT. ACTION ON MOTION (14): GRANTED. BY MERITS PANEL. FILED: 01/29/99. (EOD 01/29/99 BY AV) 97-5146
12/8/98	Appellant - MOTION FOR A 28-DAY EXTENSION OF TIME TO FILE THE OPPOSITION TO THE REHEARING. (MS-12/08/98) FILED: 12/08/98. ON CONSENT. ACTION ON MOTION (13): GRANTED. THE OPPOSITION IS DUE 1/12/99. BY MERITS PANEL. FILED: 12/11/98. (EOD 12/11/98 BY AV) 97-5146
2/18/99	Appellant - MOTION FOR LEAVE TO FILE A RESPONSE TO THE AMICUS BRIEF. (THE RESPONSE IS SUBMITTED W/THIS MOTION) [NPF] (MS-02/18/99) FILED: 02/18/99. ON CONSENT. ACTION ON MOTION (15): LEAVE TO FILE IS GRANTED. BY MERITS PANEL. FILED: 03/05/99. (EOD 03/05/99 BY AV) 97-5146
5/13/99	REVERSED. PRECEDENTIAL OPINION BY: J. PLAGER. DISSENTING OPINION BY: J. NEWMAN. JUDGMENT ENTERED: 05/13/99. COSTS AGAINST APPELLEE. (EOD 05/13/99 BY KSH) 97-5146

DATE	PROCEEDINGS
5/20/99	MANDATE ISSUED TO THE CFC: 05/20/99. (EOD 05/20/99 BY JCW) 97-5146
8/10/99	PETITION FOR WRIT OF CERTIORARI FILED 08/10/99, SUPREME COURT #: 99-244. (EOD 08/13/99 BY JW) 97-5146

FINAL

SECRETARIAL ISSUE DOCUMENT
SOUTH ATLANTIC
OCS SALE 56

February 1981
U.S. Department of the Interior

* * * *

—Successful exploratory wells in this frontier area will have to be followed by a greater number of delineation wells than normal in order to assure an adequate resource to justify the extremely high development costs (platforms, guyed towers, tension leg platforms, deep pipelines, etc.) in these water depths. Preliminary information suggests that an average of seven to eight delineation wells may be needed in this area as opposed to the normal four to five. Each well takes 4 to 5 months to drill once a ship is on site.

—Because there is no existing infrastructure, facilities, such as pipelines, and production techniques would have to be developed. These time-consuming projects would take much longer than a 5-year lease term provides. Suspensions of operation or production (SOP's), pursuant to USGS regulations (30 CFR 250.12), which extend the lease term, are discretionary and are not easily applied to these situations. Also, since they would be applied on a case-by-case basis, consistency of treatment is not assured. From a policy standpoint, it would be better to grant longer lease terms for a problem known to exist at the time of lease issuance. The lease term should be designed to include time to begin production and not just to conduct exploratory and delineation drilling. In the shallower water depths of the Gulf of Mexico, experience indicates that the standard lease term is usually enough to begin production and thus it was conceived of as normally encompassing the time necessary to begin that phase. The predictability of a longer lease term can do much to assure industry that they will be allowed

enough time to do the job right instead of depending on discretionary administrative action to correct a situation later when hundred million dollar investments are involved.

Existing Departmental regulations contain mechanisms to encourage early activity on all leases. Such mechanisms are particularly beneficial in countering perceived speculative aspects of leases issued for primary terms longer than the normal 5-year period. USGS regulations (30 CRF 250.34-1(a)(3)) provide that for leases issued with an initial period of more than 5 years, the lessee must submit either an exploration plan or a general statement of exploration intentions within a period of time specified at the time of offering the tracts for sale. The USGS has indicated that 3 years would be a proper time and this is proposed as part of this option.

Due to all these factors, an option has been developed to select a 10-year lease term of 137 tracts (Tract Nos. 1-39, 46-130, 162-174). While the Secretary could select a lesser time for the primary lease term (for example, 8 years) based on his judgment and consideration of the numerous factors involved, a uniform 10-year term was constructed as an option because (1) it is difficult to determine with precision, that 8 years or any other number, is adequate and 10 years excessive, (2) the shortage of drill rigs for the unusually deep water involved, (3) the desire to avoid adjacency and structure splitting problems should a shorter lease term tract be chosen next to a longer lease term tract, (4) the near certainty that production might not begin even within the maximum 10 years allowed by statute, (5) the judgment that a longer lease term is a more appropriate policy response than relying on cumbersome and discretionary SOP's on a case-by-case basis.

[Logo]

NORTH CAROLINA DEPARTMENT OF NATURAL RESOURCES & COMMUNITY DEVELOPMENT

James B. Hunt, Jr., Governor
Joseph W. Grimsley, Secretary
James A. Summers, Deputy Secretary
Telephone 919 733-4818

August 17, 1982

Mr. Bruce E. Wamsley
Mid-Atlantic District Supervisor
Minerals Management Service
515 Tilton Road
Northfield, New Jersey 08225

Dear Mr. Wamsley:

The State of North Carolina has completed its review of Chevron's exploration plan, environmental report, and consistency certification for block 510, OCS lease sale #56. The review also included the July 21st Appendix to the exploration plan which was prepared at the state's request. We concur in Chevron's consistency certification. We are satisfied for the appropriate federal agencies to issue the permits and approvals described in the exploration plan. Each federal agency should notify the State of North Carolina as permits are issued.

The State of North Carolina will continue its efforts with Chevron, the Coast Guard, and MMS to reduce the response times for oil spills.

Chevron, their consultants, and MMS have been most cooperative throughout this consistency review. The state

is grateful and looks forward to a continued good relationship.

If you have any questions on this matter, please let me know.

Sincerely,

/s/ James A. Summers
JAMES A. SUMMERS

JAS:ap

cc: Governor James B. Hunt, Jr.
Mr. Bill Matuszeski
Acting Asst. Administrator, OCZM, NOAA
Mr. Harold Nasse
Chevron U.S.A., Inc.
Dr. Harold D. Palmer
Interstate Electronics Corp.
DCS Task Force

[State Logo]

STATE OF NORTH CAROLINA
OFFICE OF THE GOVERNOR
Raleigh 27611

James B. Hunt, Jr.
Governor

October 15, 1982

Dear Mr. Ake:

This letter is my response to Atlantic Richfield Oil and Gas Company's Exploration Plan and Environmental Report. The information included in this letter should help you prepare your Environmental Assessment.

The State of North Carolina has no objections with the proposed project as described in the Exploration Plan. There are three contingencies, however, that are of critical importance to the acceptability of this plan.

They are:

(1) Satisfactory revision of the ARCO Oil Spill Contingency Plan;

(2) Adequate information from the Currents Study being conducted by ARCO and the subsequent determination of the availability of and the intent to use appropriate technology, and;

(3) The implementation of an acceptable photo-documentation survey of biological resources in the exploration area.

I recommend that these documents be submitted to the State for review and comment. They represent factors which are important to our determination of the adequacy of the Exploration Plan.

Enclosed are comments and questions raised by my staff which require attention.

Please call me or my staff if I can be of assistance to you in the preparation of the Environmental Assessment.

My warmest personal regards.

Sincerely,

/s/ James B. Hunt, Jr.

Mr. Larry Ake
Mid-Atlantic Acting District Supervisor
Minerals Management Service
515 Tilton Road
Northfield, New Jersey 08225

Enclosure

[State Logo]

STATE OF NORTH CAROLINA
OFFICE OF THE GOVERNOR
Raleigh 27611

James G. Martin
Governor

6 October 1988

Mr. Ralph Ainger
Acting Regional Manager
Minerals Management Service
1951 Kidwell Drive
Vienna, Virginia 22180

RE: Mobil Plan of Exploration Off North Carolina

Dear Mr. Ainger:

In recent discussions with Mobil and your office, my staff and I expressed our grave concerns about the impacts development of any hydrocarbon resources would have on the State's valuable estuarine system and other important coastal resources. In my direct discussions with representatives from Mobil, I stressed the necessity of providing quality and substantive information to our citizens and state government to allow us to plan how to best protect our fragile coastal resources. The purpose of this letter is to reaffirm that request to the responsible federal agency.

The first issue I wish to address regards the environmental impact analyses. The State has consistently maintained that the earlier environmental impact statements (EIS), completed before and after the leases were issued are unsound for some topics. The level of scientific information for these ocean areas has increased dramatically since 1981. It shows unquestionably that the prior analyses were based on flawed data and assumptions. Direct

and indirect onshore impacts from a discovery the size Mobil is projecting were never sufficiently analyzed. Consequently, the State demands that a full environmental impact statement be prepared on the Mobil proposal. Otherwise, the plan will be incomplete and the State will challenge any contrary decision.

My staff and I are aware of the practical importance of giving early and specific statements of information needs. We have strived to do so in each of our respective meetings. I am especially pleased by the recent decision of Mobil to provide complete data on each of the seven proposed exploratory wells rather than dividing the information into two submissions. However, I remain concerned whether the analysis accompanying this information will be developed through the interactive procedures embodied in the standards established by the President's Council on Environmental Quality for implementation of the National Environmental Policy Act. I am equally concerned that the analysis include a discussion of reasonable alternatives to the various decisions your agency will make. Consequently, the State considers it essential that the environmental report accompanying the plan of exploration be a full EIS, including alternative actions and developed after the opportunity for notice and comment by the public and government agencies. I consider our citizens' continuing demand for that level of scrutiny appropriate and proper.

The second significant issue that I raise is of equal importance to our citizens and the State. From my consultations with the Attorney General's staff and my own staff, I understand that the Outer Continental Shelf Lands Act (OCSLA) separates the exploration and development phases of lease activity for regulatory purposes. However, I am also informed the Act vests in your agency the authority to require that Mobile accompany the plan

of exploration with "a general statement of development and production intention which shall be for planning purposes only and which shall not be binding on any party." Our citizens are deeply concerned about the direct, indirect and cumulative onshore and offshore impacts of the proposed action.

For these reasons, I request you exercise your authority under the OCSLA and your regulations to require that Mobil submit such a statement with its plan of exploration. It is North Carolina's position that the statement is within the range of information and date which may be required under § 250.33(b)(21) of your regulation entitled "Exploration Plan" and is necessary to a full and fair evaluation of the plan of exploration.

By copy of this letter, I have relayed these concerns to Mobil. I look forward to your reply and our continued cooperation to bring forward all the information needed to decide the critical issues raised by exploration in this frontier area. I urge you to employ your authority so that examination of the critical issues precedes any action by your agency. By separate letter Donna Moffitt will forward a more specific statement of minimal information needs the State has identified. Should similar critical information needs be identified, I shall forward them to you immediately.

Sincerely,

/s/ Jim Martin
JAMES G. MARTIN

JGM/DFM/dw

cc: Senator Jesse Helms
Senator Terry Sanford
Representative Walter B. Jones
Attorney General Lacy H. Thornburg
Donald Hodel, Secretary of the Interior
William Bettenberg, Director of
Minerals Management Service
William C. Whittemore, Mobil Oil
Robert W. Haines, Mobil Oil

[State Logo]

NORTH CAROLINA
DEPARTMENT OF ADMINISTRATION
400 Oberlin Rd., Suite 300
Raleigh, North Carolina 27605
Telephone 919-733-2290

James G. Martin, Governor
James S. Lofton,
Secretary

Office of Marine Affairs
W. Neal Conoley, Jr.,
Director

October 20, 1988

Mr. Ralph V. Ainger
Minerals Management Service
Atlantic OCS Region
1951 Kidwell Drive, Suite 601
Vienna, Virginia 22180

Dear Ralph:

In Governor Martin's letter of October 6, he stated that I would be sending you more details of our information requirements for Mobil's offshore drilling proposal. We have identified the following concerns that we believe must be addressed by Mobil and/or MMS in the POE or other accompanying documentation:

1. Correct and update information in the old EIS for fisheries data, oceanographic conditions, and N.C. population figures that account for seasonal variations and community infrastructure needs and are based on a discovery the size Mobil is projecting. This can be accomplished through a new EIS or a supplemental EIS or an environmental report developed under procedures allowing for notice and opportunity to be heard by

the public and state and federal agencies. Mobil would have to specifically answer how concerns raised at public hearings and through written comments were addressed in the POE.

2. Work with N.C. to

   a. identify an optional drilling window which we believe should be slightly different than Mobil's proposed window;

   b. develop an oil spill contingency plan that provides a prioritized scheme for environmental and resource protection from oil spills if computer modelling of trajectories proves infeasible.

3. Comply with the Ocean Discharge Criteria of the Clean Water Act for its NPDES discharge permit.

4. Provide seismic data, bottom surveys, and spill trajectories (or an alternative acceptable to N.C. with respect to oil spill planning) for each well site identified in the POE. Be prepared to shift well head locations to avoid biological activity or geohazards if photo surveys or bottom profiles warrant such action.

5. Provide alternatives on timing of drilling, types of drilling muds and alternative ways of disposal, alternative staging sites and work force requirements. Compare Mobil's proposed drilling site to North Sea or Surinam drilling conditions.

6. Provide details on a potential hydrogen sulfide plant including size, location, work force, impacts on air or water quality, surface or ground water requirements, solid or hazardous waste treatment or disposal concerns, safety issues, leak detection and warning systems.

7. Provide preliminary planning data on how gas and/or oil will be brought to shore and where, alternative locations for processing or distribution plants, size of work crews for developing the field and laying pipelines, anticipated fabrication facilities, population rises and falls of work crews and their families during exploration, development and production phases.

8. Provide data in sufficient detail to allow our State agencies to conduct an adequate consistency review.

9. Consider establishing a formal panel of state, federal, industry and local interests to work out the details of how Mobil can best address our concerns.

Addressing these issues may require Mobil to delay exploratory drilling until spring 1990.

In summary, we are prepared to oppose Mobil's proposal unless Mobil provides enough information to show that the anticipated and proposed offshore and onshore activities can be conducted safely and with the least harm to our valuable coastal resources. We believe that we can best deal with fiscal, environmental, and other effects of OCS development if we anticipate, plan for, and attempt to mitigate potential negative impacts. The ultimate impact of OCS generated activities, development, new population and increased service demands will be significantly reduced by the planning and prevention measures undertaken now at the federal, state, regional, and local levels.

Thank you for your attention to this matter.

Sincerely Yours,

/s/ Donna
DONNA D. MOFFITT
Chairperson
Governor's Working Group on
Mobil Offshore Drilling

DDM/kl

cc: Mr. Robert Haines
Mr. William Whittemore
Mr. Edmund Welch
Dr. David Gettleson

[State Logo]

NORTH CAROLINA
DEPARTMENT OF ADMINISTRATION
19 W. Hargett, St., 9th Floor
Raleigh, North Carolina 27601
Telephone 919-733-4656

James G. Martin, Governor Outer Continental Shelf Office
James S. Lofton, Secretary Donna D. Moffitt, Director

January 9, 1989

Mr. William Whittemore, Esq.
Senior Counsel
Mobil Exploration and Production U.S., Inc.
1250 Poydras Building—Suite 2021
New Orleans, Louisiana 70113

Dear Bill:

As I have mentioned to you, we have begun to identify our informational needs for the wildcat drilling activities at the Manteo Unit. Because we are inexperienced, we may be asking these questions prematurely, or they may be overly simplistic, or you may feel some of the responses would involve proprietary data. However, we are trying to learn as much as we can about the level of data we will be allowed to review, the relevance of the data, and when and in what form we will be allowed to review it. We think this approach will help us get through the Governor's review phase and our consistency review more effectively and efficiently and perhaps prevent needless delays due to our shortcomings or misunderstandings. We also need to assure a worried public that we are doing all that we can to protect their best interests and the State's natural resources. We can best accomplish that by

asking direct questions and receiving reassuring and informative answers. Simply relying on MMS regulations to answer all our questions or taking your word that Mobil knows what it is doing just isn't good enough for our first offshore exploration well. Perhaps after we have more experience, we will feel comfortable enough with the process that we no longer ask for this type or level of information at this stage of the process. That is why Mobil's response to our informational requests is so important.

How can the following information be provided to us—in the POE, in separate documents, during informal technical meetings, or by other means? Your prompt response as to the level of disclosure your company can accommodate and as to the earliest point at which such information will be made available will be greatly appreciated.

PRESENTLY IDENTIFIED AREAS OF CONCERN REGARDING EXISTING PHYSICAL CONSTRAINTS:

1) Slope—The bottom in the drill site area is highly dissected by canyons and the continental slope averages about fifteen degrees. The canyons are regions of slope instability, and there are several known large slope failures to the north and south of this area. Please provide data which characterizes the slope conditions at the drill site. Emphasis should be placed on slope stability, the possibility of slope failure, and proposed engineering solutions to prevent foundation failure or to handle a massive foundation failure if such were to occur. Information on slope failure could be provided as part of a Shallow Hazards Survey and through photo documentation.

2) Frozen Gas Hydrates—The drill site is in a known area of frozen gas hydrates (clathrates) in the shallow

sub-bottom. Discuss provisions for dealing with these gas hydrates in the event they are encountered during the drilling operations.

3) Ocean Currents—The drill site is under the influence of the Gulf Stream and periodic spin-off eddies which can cause extreme currents and extreme changes over short time spans at both the surface and throughout the water column. Discuss the capabilities of a dynamically positioned drillship (or a moored system if that is ultimately selected) to adequately maintain its position above the well while drilling under adverse conditions. The total generating capacity and safety factors utilized to arrive at the expected peak load should be included. Equipment redundancy and worst case scenarios for catastrophic failures will need to be clearly defined. The accompanying specific items should be discussed fully:

a) Provide an analysis of affecting forces on the vessel and the riser. The analysis should be based on the existing depth versus current velocity data for the drill site. Discuss riser design in relation to current velocity sheer potential.

b) Discuss the power requirements of the dynamic positioning system to be able to remain on drilling location under adverse weather conditions and the effects of adverse weather on drilling operations requirements. Under worst case conditions, will drilling operations be reduced or shut down due to lack of generating capacity for thruster power demands? Please describe in detail how an emergency shutdown will be accomplished.

OVERALL WELL PLANNING CONCERNS:

1) Well and Pore Pressure Concerns for the Manteo Unit (including but not limited to the following):

a) On which detection method(s) are the seismic pressure estimates based?

b) Describe the pressure gradients generated or anticipated pressures to be encountered.

c) Describe specific transitional zones identified based on geophysical methods, data correlation from Exxon's Hatteras well logs, and regional trends observed on the eastern continental shelf drilling program. What procedures are planned for the possibility that extremely porous zones may be encountered, resulting in potential muds system failures?

d) Discuss the estimated probability of an underground blow-out and the potential for resulting problems at the sea bottom or for marine resources.

e) Describe the general well prognosis including the kind of rock above the producing formation and the rock contained in the producing formation.

f) Describe the riser specifications (including whether or not a fairing will be used) and provide an analysis of expected collapse loads due to pressure differentials in case of a gas kick in the spudding or early stages of the drilling program.

g) Casing size, weight, and piping schedule in addition to the installation program should be made available.

h) Describe the process and technology that will be used in connection with any directional drilling or deviations from straight line drilling. Describe the procedures to be implemented if stuck pipe is encountered and the decision is made to cut and drill around it.

2) Pressure detection and control methods to be utilized while drilling operations are underway:

a) drilling mud parameters;

b) lithological observations (shale showings, etc.);

c) rate of penetration, rotary speed, weight on bit, flow-shows, shale density, gas detection-hot wire method, flowline temperature;

d) kick tolerance estimations;

e) muds disposal systems.

3) Well completion techniques.

a) Describe how Mobil plans to permanently seal the Manteo well if no producing quantities of oil or gas are found.

b) What are Mobil's proposed well completion techniques if production were to occur?

SEISMIC/GEOLOGICAL DATA NEEDS:

1) Maps indicating the shape of the structure and surface conditions over the structure.

a) Sea bottom contour maps for all blocks with proposed well sites.

b) Structural depth contour map at top of objective horizon.

c) Two additional structural contour maps above objective horizon (preferably at about 2,000′ intervals above the objective horizon).

d) Structural depth contour map at base of objective horizon or deeper.

2) Six seismic sections (in two forms—one uninterpreted cross section and the remainder in annotated or interpreted cross sections, including faults and mapped horizons, in both recorded time and corrected depth):

a) Three sections running parallel to one another.

b) Three sections running parallel to one another and perpendicular to "a)" above.

c) Middle section of each set should intersect at or near the primary well locations.

3) Depth estimate to the top of the structures.

4) A shallow hazards survey.

PHOTO AND SONAR DOCUMENTATION:

We would also like to request that a series of benthic photographs and sonar transects be completed as soon as possible at the Manteo Exploration Block wildcat well site. This preliminary survey could be completed during the cruise of the Manteo Block Water Current Study. The sonar transects should depict a three dimensional picture of the well site out to a distance of 3,000 feet and provide a depth profile for each photograph. The benthic photographs should be 35mm color slides and of sufficient resolution to allow identification of biological material. The photographic transects should extend from the well site the same distance as the sonar tracks. The information obtained from this initial survey will help to develop a characterization of the physical habitat within the 21 block unit. Such a characterization would be essential, especially if production is ever proposed for the Manteo Unit.

Thank you very much for working with us and we look forward to your response at your earliest convenience.

Sincerely,

/s/ Donna
DONNA D. MOFFITT
Chairperson
Governor's Working Group

cc: Secretary Lofton
Secretary Cobey
Bruce Weetman, MMS

F16NC1.

FINAL
April 1, 1989
10:02am

Question: Is it the policy of MMS to turn down an exploration plan if significant environmental impacts are shown, rather than do an environmental impact statement?

—Do you feel it is impossible to do an environmental impact statement under the 30-day DOI review process?

—Do you see any conflict in this policy and complying with the National Environmental Policy Act's requirements to prepare an EIS, if an environmental assessment shows significant impact?

Answer: If significant environmental impacts were to be shown, we would not approve an exploration plan since the OCS Lands Act specifically provides that a plan must be disapproved if it is determined that any proposed activity under such a plan would cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral (in areas leased or not leased), to the national security or defense, or to the marine, coastal, or human environment; and, the activity cannot be modified to avoid the harm or damage (43 U.S.C. 1340 and 43 U.S.C. 1334). MMS reviews each exploration plan on a case-by-case basis to determine whether exploratory drilling activity will have significant environmental effects. This is in accordance with the National Environmental Policy Act and the Outer Continental Shelf Lands Act as well as regulations formulated specifically for OCS oil and gas leasing. Based upon accumulated information on approximately 8,000 exploratory wells, including approximately 50 in the Atlantic,

no demonstrated significant environmental effects have resulted from exploratory drilling activity. To date, environmental assessments which have been prepared for exploration plans have applied the accumulated information on environmental effects of previous exploratory wells, as well as pertinent site specific information, and have concluded that no significant environmental effects would occur.

It is not feasible to complete the EIS process during the statutory deadline of 30 days for review of an exploration plan. It is important to note that the 30-day period is not discretionary, but is specifically dictated by statute (40 U.S.C. 1340).

We see no conflict with our policy and compliance with the National Environmental Policy Act. In accordance with the Council on Environment Quality (CEQ) regulations for implementing NEPA, environmental assessments are prepared not only to determine if an EIS is required but also to assist the agency in planning and decision making (1501.3). Based on past experience, we have no reason to expect that an EA will indicate the need for an EIS in this instance. We nevertheless prepare EA's on exploration plans because they are valuable to our decision process.

F17NC2.

Question: How many exploration plans has MMS ever disapproved?

—What are the consequences to MMS for disapproving an exploration plan or cancelling a lease?

—Has MMS ever taken more than 30 days to approve an exploration plan, and if so, what were the consequences to either MMS or the lesses?

Answer: The Minerals Management Service (MMS) does not ordinarily disapprove exploration plans. If the plan is deficient in some manner, the operator is contacted to correct the deficiency. However, since the 1978 Amendments of the Outer Continental Shelf Lands Act (OCSLA) were enacted, there have been 15 disapprovals of exploration plans. These disapprovals were caused by incomplete or inappropriate plans (6) on conflicts with military uses (9). The MMS has never needed to cancel an OCS oil and gas lease under the OCS Lands Act Amendments of 1978, since no activities on leases have caused undue harm to the environment. The ultimate consequence of being unable to reconcile difficulties with an exploration plan due to conflicting uses or unmitigatable environmental damage would be cancellation of the lease. The OCSLA provides that the lessee is entitled to compensation if the Secretary cancels a lease.

The MMS has taken final action on all exploration plans within the 30-day period required by the OCSLA.

MEMORANDUM OF UNDERSTANDING BY AND BETWEEN THE STATE OF NORTH CAROLINA, MOBIL OIL CORPORATION, AND THE MINERALS MANAGEMENT SERVICE REGARDING EXPLORATION OF OUTER CONTINENTAL SHELF LEASES OFFSHORE NORTH CAROLINA

This memorandum of understanding is entered into on July 12, 1989, by the State of North Carolina (the State), Mobil Oil Corporation (Mobil), and the United States Department of the Interior's Minerals Management Service (MMS), in order to satisfy the statutory requirements of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.*, and the Coastal Zone Management Act (CZMA), 16 U.S.C. 1451 *et seq.*, and to satisfy the State's needs for information and analysis concerning the environmental impacts of exploration activities conducted by Mobil on leases held by Mobil and others located on the federal Outer Continental Shelf offshore the State, including leases on block numbers 204, 246, 247, 290, 291, 334, 335, 378, 379, 422, 423, 466, 467, 510, 511, 553, 554, 555, 597, 598, 599, 640, 641, or 642.

The following agreement provisions are graphically presented in the Environmental Action Plan Timeline attached hereto and made a part of this memorandum as Attachment A. The timeline is intended to illustrate the text of the agreement; if there is an inconsistency between the timeline and the text, the text controls.

I

WHEREAS Mobil is a lessee in whole or in part of certain Outer Continental Shelf oil and gas leases offshore the State of North Carolina including blocks 423, 467, 511, and 554 on protraction diagram NI 18-2; and,

WHEREAS, Mobil intends to explore these leases pursuant to section 11 of the OCSLA, as amended, 43 U.S.C. 1340; and,

WHEREAS, Mobil has negotiated with and may unitize its lease interests with the interests of some or all of the following lessees including Amerada Hess, Marathon, Chevron, Conoco, Occidental, Shell, and Union for lease blocks in the same general area as Mobil's leases, thereby becoming the unit operator; and

WHEREAS, Mobil must submit to the MMS for review and approval an Exploration Plan (EP) pursuant to section 11(c)(1) of the OCSLA, 43 U.S.C. 1340(c)(1) prior to conducting its exploration activities; and,

WHEREAS, the MMS must review the environmental impacts of Mobil's EP pursuant to section 11(c)(1) of the OCSLA, 43 U.S.C. 1340(c)(1), and the National Environmental Policy Act (NEPA), prior to approving, disapproving, or requiring modification of the EP; and,

WHEREAS, pursuant to section 11(c)(1) of the OCSLA, 43 U.S.C. 1340(c)(1), the MMS must approve, disapprove, or require modification of Mobil's EP within thirty days of the date on which Mobil's EP is deemed submitted; and,

WHEREAS, Mobil must submit its certification that the activities described in detail in its EP are consistent with the State's coastal management program (CMP) pursuant to section 307(c)(3)(B) of the Coastal Zone Management Act (CZMA), 16 U.S.C. 1456(c)(3)(B); and,

WHEREAS, the State must review the activities described in detail in Mobil's EP for consistency with the State's CMP pursuant to section 307 (c)(3)(B) of the CZMA, 16 U.S.C. 1456(c)(3)(B); and,

WHEREAS, the MMS may not issue permits for any exploration activities contained in Mobil's EP prior to receiving the State's concurrence with Mobil's consistency certification or until such concurrence may be conclusively presumed, or until the Secretary of Commerce makes the findings set forth in section 307(c)(3)(B) of the CZMA, 16 U.S.C. 1456(c)(3)(B); and,

WHEREAS, the Environmental Report which MMS will prepare under this agreement will address a broader range of State concerns than MMS could consider in an environmental impact statement prepared under NEPA;

THEREFORE, the State, Mobil, and the MMS hereby agree to the following:

II

THE MMS agrees to:

1. Use the draft outline of the Environmental Report (ER), which is attached hereto and made a part of this memorandum as Attachment B, as the starting point for the consultation process in which the State and MMS will participate and by which the contents of the ER will be determined to meet the specific needs of the State or MMS;

2. Prepare an ER which will assess, as a minimum, the environmental impacts of Mobil's EP and the potential 21-block unit as described in Part I, the report from the oil spill risk analysis modeling for mid-Atlantic Lease Sale 121, the potentially affected coastal environment, the effects associated with exploratory drilling for the initial well and all reasonably foreseeable delineation wells, the potential impacts of spills of oil or gas during drilling operations on the North Carolina coastal environment, and such additional issues as may be agreed to by the State and MMS;

3. Submit to the State on July 17, 1989, the report from the oil spill risk analysis modeling for mid-Atlantic Lease Sale 121, a description of the potentially affected coastal environment, and a generic description of the effects associated with exploratory drilling;

4. Participate in at least three public meetings concerning the information submitted to the State in August 1989 at a location or locations to be determined by agreement of MMS and the State;

5. According to the outline submitted to the State, prepare a draft ER for publication and review and comment by the State and the public on November 1, 1989;

6. Participate in at least three public hearings concerning the draft ER during the week of December 4, 1989, at a location or locations to be determined by agreement of MMS and the State;

7. After consideration of comments on the draft ER, prepare a final ER for submission to the State by February 1, 1990;

8. Determine pursuant to 30 C.F.R. 250.33(e) whether Mobil's final EP should be deemed submitted, transmit the EP to the State on the date the EP is deemed submitted, and begin preparation of the Environmental Assessment (EA);

9. Review comments on the EP submitted by the Governor after his 20-day review;

10. Complete the EA, and approve, disapprove, or require modification of Mobil's EP within 30 days of the date the EP is deemed submitted, if no other NEPA document is required;

11. Prepare an ER with the scope and process described on the first EP to be submitted on any of the

lease blocks listed in the opening paragraph of this memorandum of understanding if the Mobil EP is not the first EP, for the listed lease blocks, to be reviewed by MMS. However, if the lessee submitting the EP does not agree to the process set forth in Article IV of this agreement, then MMS and the State will consult immediately to identify a mutually agreeable alternative process;

12. Issue a suspension of operations for any of those nineteen leases due to expire on August 31, 1991, which are included in the draft EP. The suspension will not prevent the conduct of preliminary activities as defined in 30 C.F.R. 250.31 (1988). The suspension will be directed by the Regional Supervisor under 30 C.F.R. 250.10 (b)(4). It will be effective on the date Mobil submits the draft EP under this agreement and will expire on February 1, 1990, or on the date MMS submits the final ER to the State, whichever is later;

13. If the State objects to Mobil's certification of consistency, or if any other administrative or judicial challenges or appeals arise, or if the issuance of the permits for Mobil's exploration activities is delayed due to any of the other circumstances contemplated by 30 C.F.R. § 250.10, upon Mobil's application, issue additional suspensions of operations, pursuant to 30 C.F.R. § 250.10, to allow for the resolution of such matters and to allow Mobil two drilling seasons under the EP thereafter. For the purpose of this paragraph, a drilling season is the period of May 1 through October 31.

III

THE STATE agrees to:

1. Provide data agreed to in a timely manner;

2. Participate in public meetings concerning the information submitted to the State in August 1989 at a loca-

tion or locations to be determined by agreement of MMS and the State;

3. Participate in public hearings concerning the draft ER and draft EP during the week of December 4, 1989, at a location or locations to be determined by agreement of MMS and the State;

4. Begin its CZMA consistency review of Mobil's final EP on the date of receipt of the final EP from the MMS; and,

5. Complete its CZMA consistency review within seventy-five (75) days of receipt of the EP, and on that day issue its concurrence with or objection to Mobil's consistency certification.

IV

MOBIL agrees:

1. To submit a non-binding draft EP on September 1, 1989, including all documentation required by law and such additional supporting information and documentation as shall be hereafter agreed to by the parties to this agreement; and,

2. Not to submit a final EP to the MMS before January 18, 1990.

V

GENERAL AGREEMENT OF THE PARTIES:

1. Time being of the essence, all dates contained in the foregoing sections II-IV are subject to change only pursuant to subsequent written agreement of the parties, provided, however, that the time between each step depicted in Attachment A shall remain constant.

2. By entering into this agreement, the State of North Carolina has not waived any legal remedies it may have

to challenge the approval of Mobil's EP or related permits and approvals for activities described in the plan. The Department of the Interior has not waived any defenses or remedies it may have if the State files such a challenge. Mobil Oil Corporation and the co-lessees of the leases included in the EP or unit have not waived any rights, defenses, or remedies they may have with respect to their exploration of their leases.

APPROVED:

Minerals Management Service

/s/ [Illegible]
Acting Director

Date: 7-11-89

State of North Carolina

/s/ James G. Martin
Governor

Date: 7-12-89

Mobil Oil Corporation

/s/ [Illegible]

Date: 7-11-87

/s/ [Illegible]
Secretary,
Department of Administration

Date: 7-12-89

/s/ [Illegible]
Attorney General

Date: 7-12-89

NORTH CAROLINA
DEPARTMENT OF ADMINISTRATION

James G. Martin, Governor Outer Continental Shelf Office
James S. Lofton, Secretary Donna D. Moffitt, Director

November 20, 1989

MEMORANDUM

TO: Secretary Jim Lofton
Secretary Bill Cobey
Phil Kirk/Nancy Temple
Tim Pittman

Donna Moffitt /s/ Donna

SUBJECT: Opportunity for Official State Comment on MMS' Draft Environmental Report

ACTION ITEM: The Minerals Management Service (MMS) will be holding its public hearings December 4-7 on the draft Environmental Report (ER) that was prepared pursuant to the MMS/N.C./Mobil Memorandum of Understanding. The State has not had a major public statement since the announcement of the signing of the MOU. Our next opportunity for a public statement is during MMS' public hearings. The purpose of this memorandum is to alert you to the fact that the opportunity exists for the State to make a strong statement—even going so far as asking for the timeline to be suspended while MMS tries to do a better job on the next version of the ER—and to ask that you consider who the appropriate spokesperson should be to deliver the State's comments.

BACKGROUND: Several major events are causing more and more focus to be placed on North Carolina and the

Mobil project. Examples are Rep. Barbara Boxer's bill to be introduced in Congress today in which oil and gas activities would be banned out to 175 miles off the N.C. coast (we have no idea where this figure came from), and the 21 lease blocks in the Manteo exploration unit are specifically identified for possible buy back; the brand new National Research Council (NRC) of the Academies of Sciences and Engineering report which is very damaging to the offshore oil and gas program and very critical of (1) the inherent conflict of interest created as a result of the agency that is responsible for opening up the OCS for oil and gas development (i.e., MMS) also preparing the environmental baseline data, and (2) MMS' lack of adequate environmental and socio-economic data to conduct leases off the California and Florida coasts (The NRC report focused only on Calif. and Fla. but there has already been national press coverage about how this report has obvious implications for the Mobil exploration off our coast. I have attached for you [sic] review an excellent analysis by Clark Wright of the Ocean Unit for the NRC's major findings as they relate to Mobil's proposal and MMS' environmental report.); and Rep. George Miller of California's call for public hearings (Congressman Rose is asking him to consider holding one in N.C. in 1990) on significantly amending the Outer Continental Shelf Lands Act to give coastal states more authority in the oil and gas program. So far we have declined to comment on any of the above items, nor have we commented publicly on Mobil's draft Exploration Plan or MMS' draft Environmental Report, and the pressure is mounting for the State to say something!

ANALYSIS: Our review of MMS environmental report is that it violates the MOU in its adequacy of analysis and scope of the alternatives presented, i.e., it impermissibly breaks down the environmental review into a one-

well scenario and a seven-well scenario which is contrary to the requirements of the MOU; it is a very poorly prepared document with many errors, omissions, and dated material; the data and analysis presented on many topics is not focused on the resources or conditions existing off our coast but instead is a generic presentation of information; it arbitrarily dismisses or ignores significant data that the State provided about our own resources onshore and offshore; and it arbitrarily selects data that is favorable to the MMS point of view that neither Mobil's test well nor the 6 delineation wells will have significant or long term impacts while ignoring data that is unfavorable to this predetermined point of view of MMS'.

As you might expect, the public is going to have severe and justified criticism of the draft ER and of the State for believing that MMS could produce an adequate and objective "custom made" environmental analysis of Mobil's proposal and potential future development. The NRC report certainly lends credence to this view. It seems apparent that there was insufficient time to prepare such a document adequately and we ought to ask for a suspension of the timeline while MMS prepares another draft, or takes significantly longer to complete the final ER, or contracts with an independent consultant to finish the environmental review and analysis. A suspension of the timeline will not harm Mobil, and may in fact be beneficial to Mobil, because its leases are suspended during the time that the ER is being prepared. From what we gather from Mobil's comments to us, Mobil is looking for an excuse not to drill next year anyway, and this could take some of the pressure off them. It's a near certainty that, regardless of what happens on the draft ER and MOU timeline, Mobil will not be drilling before Spring 1991 at the earliest.

It seems clear that whoever has the strongest statement at the first public hearing in Manteo will get the publicity. We ought to consider the appropriateness of the State leading off the first public hearing at 3:00 p.m. on December 4 in Manteo with a strong statement.

I look forward to your thoughts on this matter.

Attachment

APPENDIX A

UNIQUE FACTS REGARDING MOBIL'S PROPOSED EXPLORATION

The factors supporting the State's unique factual situation allowing us to argue that in this one situation, an EIS should be prepared for exploration activities:

The age of the existing lease sale EIS

The inadequate discussion of material issues in the existing lease sale EIS and subsequent lease sale EISs for the same geographic area

The express language in the lease sale EIS providing for the possibility of an EIS at the exploration stage

The "frontier" nature of offshore drilling off the North Carolina coast

Unique drill site conditions including the depth of the water, the steepness of the sea floor, known geohazards existing in the general area, the unpredictability and severity of the weather, the swiftness and unpredictability of the ocean currents, the proximity of a prime recreational fishing area, and the proximity of spawning grounds for commercially significant fishing species such as menhaden

The unknown character (oil, gas, or sour gas) and potential huge size of the hydrocarbon deposit

APPENDIX B

STATE'S MAJOR CONCERNS

The major concerns of the State with respect to the exploratory drilling proposal can be grouped into four categories. These are: (1) site-specific or project-specific concerns either inadequately addressed or not addressed in prior environmental documents; (2) flawed analysis based either on erroneous or incomplete information contained in existing environmental documents; (3) new information or changed circumstances which are material to a proper analysis of impacts; and (4) unreviewed impacts. The following is a detailed discussion of the State's concerns under each category.

SITE SPECIFIC CONCERNS

The oceanographic conditions where Mobil wants to drill are extremely dynamic. The unusual current regime could result in operational problems during drilling and unpredictable dispersion patterns and water column suspension of drilling muds and spilled oil. Gulf Stream currents fluctuate between 2 and 5 knots, spin-off eddies sweep across the site on the average of every 2 to 10 days, and waves approach 25 feet during Nor'easters. Thus, the State believes a slightly different drilling window whereby Mobil begins drilling in May instead of March is better. The sea bottom at the drill site is characterized by extremely rugged conditions, canyons, a continental slope of 15 degrees, and known slope failures nearby. The area is known to contain frozen gas hydrates in the shallow subbottom which, if encountered during drilling, can affect the well casing integrity and therefore Mobil's ability to prevent a loss of well control. None of the existing lease sale documents have adequately analyzed the effects of all these adverse conditions, taken to-

gether, upon an oil company's ability to maintain safe drilling and well control.

The site is also biologically rich and diverse because of the upwelling currents and other unique conditions set up by the separation of the Gulf Stream from the continental shelf. It is locally known as "The Point" and is one of the most intensely used recreational fishing sites on the whole East Coast. Significant commercial fishing activities also occur in the Point area. Whale, porpoise, and sea turtle migration routes pass through this area which is also an important site of concentrated sea bird activity. Again, no previous lease sale EIS has identified the concentration of diverse biological resources located in the Point area. The potential impacts to these biologically important resources from drilling in that area will have to be properly addressed in Mobil's environmental report.

FLAWED ANALYSIS

Oil spill risk analysis conducted for past lease sale EISs was inaccurate because it failed to account for Gulf Stream spin-off eddies. If a spill were to occur during drilling and the oil became entrained in a spin-off eddy, the oil could be brought to North Carolina's coast faster and in a different trajectory than predicted in the EIS documents. Because of this erroneous analysis, MMS has been sponsoring research pursuant to a 1983 memorandum of understanding between MMS and North Carolina to improve its ocean circulation model, adjust its oil spill risk analysis model, and gather better field data on the eddies. Until those studies are completed and the results verified by independent experts, the State will be unable to respond favorably to the Mobil oil spill contingency plan, which is an essential component of the overall exploration plan. In addition, the oil spill plan must provide for the fullest measure of protection possible for our fragile near-shore and estuarine resources.

Another area of erroneous analysis involves cumulative impact analysis. All previous environmental documents discuss impacts in a retrospective manner rather than predicting potential impacts from past, current, and foreseeable future oil and gas activities. Impacts from other ocean uses are not analyzed in a cumulative manner nor are impacts analyzed from and through all Atlantic OCS regions. Such spatially cumulative impacts are especially important in analyzing total impacts upon migratory species. This concern was specifically upheld in a recent federal court decision involving the latest 5-year leasing program.

Current and projected populations for coastal counties have been erroneously estimated in previous EISs. Total population was significantly underestimated and seasonal variations in population were not considered. The coastal counties are the most rapidly growing areas of the State and development pressures are already adversely impacting the State's coastal environments. These existing stresses must be taken as a given in analyzing the additional impacts that will, or potentially may, occur as a result of offshore oil and gas drilling.

NEW INFORMATION OF CHANGED CIRCUMSTANCES

One of the most important changes in the informational baseline used in the previous lease sale EISs involves the present prediction that gas is the most likely discovery rather than oil, and that the discovery may be as large as 5 trillion cubic feet. Previous environmental documents focused on an oil discovery, not a gas strike as

Mobil is now predicting, and certainly not of that size. The total gas reserves estimated in both the Lease Sale 56 EIS and the newest 5-year OCS leasing program for our entire OCS planning region are roughly equivalent to what Mobil now estimates for this one project offshore North Carolina alone. If the 21 blocks are formed into one unit it will be the largest unit ever approved on the U.S. OCS and if a discovery were made of the size predicted, it would be one of the world's largest gas reservoirs.

Additionally, the Lease Sale 56 EIS states that oil and gas activities will not adversely impact local community infrastructure because existing community services can meet current demand. This original assumption is clearly invalid as shown by the Morehead City example where a moratorium exists on additional waste water treatment plant hook-ups. The original impact analysis failed to accurately reflect the growing development pressures currently being experienced by North Carolina coastal communities. According to the original Lease Sale 56 EIS, CEIP (Coastal Energy Impact Program) planning monies could be used to help mitigate any anticipated community infrastructure impacts. Unfortunately, CEIP money has not been available from the federal government since late 1982.

UNREVIEWED IMPACTS

There is a complete lack of analysis of potential impacts to public health and safety in any of the previous environmental documents, particularly related to development and production of natural gas resources. Because the focus of past environmental documents was on oil instead of gas, there has been no analysis of impacts from a potential sour gas, or hydrogen sulfide, discovery. Hydrogen sulfide gas is highly poisonous and requires extensive

safety precautions. The Mobil drilling site is in an area considered by MMS regulation to be an area of unknown hydrogen sulfide potential and thus this concern must be addressed.

Another area involving unreviewed impacts concerns threatened or endangered species. Both the U.S. Fish and Wildlife Service and the National Marine Fisheries Service consulted with Interior during the preparation of the Lease Sale 56 document under authority provided in Section 7 of the Endangered Species Act of 1973. Both agencies indicated at that time that if new species which may be affected should be listed, or additional pertinent information becomes available, or if there are significant modifications to the described action, the Section 7 consultation must be reinitiated. The State is concerned newly listed species may be present in the drilling area and that potential impacts of exploratory activities are not adequately addressed in the Lease Sale 56 EIS biological opinions.

There are other unreviewed impacts that the State is currently investigating to determine the potential for impact. These include noise, radioactive disposal of drilling pipe and other material, and shore-based impacts of onshore disposal of any drilling muds that may be contaminated with substances unauthorized for ocean disposal.

Additionally, the State desires the higher level for preparation, review, and comment provided by an EIS such as disclosure, dissemination and analysis of impact information, as well as a discussion of alternatives and mitigation measures.

MOBIL EXPLORATION & PRODUCING U.S. INC.

April 17, 1990

HAND DELIVERED

Hon. William W. Cobey, Jr.
Secretary—Department of Environment,
Health and Natural Resources
State of North Carolina
512 North Salisbury Street
Raleigh, North Carolina 27611

Re: NPDES Number NC0052523
Mobil Oil Exploration & Producing
Southeast Inc. (MOEPSI)
Manteo Area Block 467, Lease OCS-A-0236

Dear Secretary Cobey:

On August 18, 1989, Mobil Exploration & Producing U.S. Inc. (MEPUS), on behalf of its affiliate Mobil Oil Exploration & Producing Southeast Inc. (MOEPSI), submitted an NPDES Permit Application for proposed exploratory drilling activities in Manteo Area Block 467, Lease OCS A-0236. On October 11, 1989, the United States Department of Commerce's Office of Ocean and Coastal Resource Management (OCRM), at the request of the State of North Carolina, granted North Carolina permission to review the proposed discharges addressed in Mobil's NPDES Permit Application as an unlisted activity for purposes of coastal zone consistency review.

Accordingly, pursuant to the federal Coastal Zone Management Act's regulations, specifically 15 CFR § 930.54(e), MEPUS has submitted to the EPA and the OCRM its Statement of Coastal Zone Consistency Certification with supporting information and documentation. In accordance with the regulatory provisions cited, MEPUS also submits to the State of North Carolina with this correspondence a copy of the Coastal Zone Consistency Certification and necessary supporting data and information required under the Federal and State regulations.

It is Mobil's understanding that, pursuant to 15 CFR § 930.54(e) and OCRM's February 9, 1990 letter/ruling, North Caorlina shall have three months from today, or until July 17, 1990, to perform its consistency review.

If you have any questions on the materials attached hereto, please do not hesitate to contact me.

Very truly yours,

/s/ William C. Whittemore
WILLIAM C. WHITTEMORE

WCW/rt

cc: Mr. Donald E. Critchfield
U.S. Department of Commerce
National Oceanic & Atmospheric Administration
Office of Ocean & Coastal Resource Management
1825 Connecticut Ave. N.W.—Rm. 706
Washington, DC 20235

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Raleigh, NC 27601

THE WHITE HOUSE
Office of the Press Secretary

For Immediate Release June 26, 1990

FACT SHEET

PRESIDENTIAL DECISIONS CONCERNING OIL AND GAS DEVELOPMENT ON THE OUTER CONTINENTAL SHELF

The President today announced a series of decisions related to oil and gas development on the outer continental shelf (OCS). The President believes that these decisions strike a needed balance between development of the Nation's important domestic energy resources and protection of the environment in sensitive areas.

Decisions by the President on Three Pending Sales.

Decision for California Sales

- Cancel all sales scheduled for 1990, 1991 and 1992 offshore California, including Sale 91 off the coast of northern California and Sale 95 off the coast of southern California.
- Conduct additional oceanographic and socioeconomic studies as recommended by the National Academy of Sciences in a review conducted for the interagency Task Force on Leasing and Development of the OCS (the Task Force). These studies should take 3 to 4 years.
- Exclude more than 99 percent of the tracts (including *all of the Sale 91 area* and *all of the Sale 95 area south of the Santa Barbara Channel*) off California

from consideration for any lease until *after the year 2000*. The Interior Department has identified 87 tracts off the coast of southern California within the Sale 95 area that have high resource potential. These tracts are located in the Santa Maria Basin and Santa Barbara Channel, where oil and gas production is currently underway. They comprise approximately 0.7 percent of all of the tracts off California, or 0.67 percent of the 74 million total acres off California that could be leased and 1.63 percent of the 30.5 million acres in the Southern California Planning Area. These tracts will not be available for leasing consideration *until after January 1, 1996* and completion of the additional studies. They will then be available only if development appears viable based on the guiding principles outlined below and the results of the studies.

Decision for Florida

- Cancel Sale 116, Part II, and exclude the area from consideration for any lease sale until *after the year 2000*. Any development after the year 2000 would be pursued only if it appears viable based on the guiding principles outlined below and the results of additional studies.
- Conduct additional oceanographic, ecological and socioeconomic studies as recommended by the National Academy of Sciences in its review. These studies should be completed within 5 to 6 years.
- Begin cancellation of *existing* leases off Florida and initiate discussions with the State of Florida for its participation in a joint federal-state buy-back of the leases.

Guiding Principles

The President's decisions were based on the following principles:

(1) *Adequate Information and Analysis*—Adequate scientific and technical information regarding the resource potential of each area considered for leasing and the environmental, social and economic effects of oil and gas activity must be available and subjected to rigorous scrutiny before decisions are made. No new leasing should take place without such information and analysis.

(2) *Environmental Sensitivity*—Certain areas off our coasts represent unique natural resources. In those areas even the small risks posed by oil and gas development may be too great. In other areas where science and experience and new recovery technologies show development may be safe, development will be considered.

(3) *Resource Potential*—Priority for development should be given to those areas with the greatest resource potential. Given the inexact nature of resource estimation, particularly offshore, priority should be given to those areas where earlier development has proven the existence of economically recoverable reserves.

(4) *Energy Requirements*—The requirements of our nation's economy for energy and the overall costs and

* * * *

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON
MERCHANT MARINE AND FISHERIES
Room 1334, Longworth House Office Building
Washington, DC 20515-6230

June 26, 1990

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

The Citizens of Florida and California have been waiting for many months for the announcement you made this afternoon imposing an offshore oil and gas leasing moratorium off their coastlines that will last throughout the remainder of this decade. I am sure they were pleased by your announcement, as were the citizens of Oregon, Washington, and New England who, *unexpectedly*, were also included in the moratorium.

Given the inclusion of areas that we had believed were beyond the scope of the Task Force's recommendations, I am equally sure that the citizens of the Atlantic seaboard were disheartened to find that leasing is still a possibility adjacent to their shores.

Therefore, I urgently request that you revise your announcement to include North Carolina and the other states of the Mid- and South Atlantic planning areas in this leasing moratorium. This makes sense for the very same reasons the other areas of the country were included. In addition, offshore North Carolina and the surrounding waters are frontier areas which have *never* been subjected to the kind of environmental studies which—though now proven inadequate—have already taken place off California and Florida.

Your announcement today was based on the need to protect the special environmental attributes of the moratorium areas. Mr. President, North Carolina's Outer Banks are home to Cape Hatteras National Seashore, Cape Lookout National Seashore, the U.S.S. MONITOR National Marine Sanctuary, numerous National Wildlife Refuges, and the Albemarle-Pamlico estuary which has been designated an estuary of national significance. Individually, and certainly combined, these areas also deserve your protection.

At your earliest possible convenience I would like to personally show you the Outer Banks and introduce you to the thousands of North Carolinians who, with me, share your concern for our nation's fragile coastal areas.

Sincerely,

/s/ Walter B. Jones
WALTER B. JONES
Chairman

[State Logo]

STATE OF NORTH CAROLINA
OFFICE OF THE GOVERNOR
Raleigh 27603-8001

James C. Martin
Governor

June 27, 1990

The Honorable George Bush
The White House
Washington, D.C. 20500

Dear Mr. President:

Yesterday, I spoke by phone with Mr. Andrew Card, your director of Intergovernmental Relations, requesting that North Carolina be included in the moratorium on oil and gas leasing and development that you announced earlier in the day. Again today, Robert Grady of OMU phoned me for further information to present to you.

I am writing you to underscore that request. Clearly, the guiding principles employed in your decision apply to North Carolina as well.

I would also suggest, Mr. President, that the most meaningful—and pleasurable—way we can show you how vital our coast and the maritime economy it produces are to our citizens is for you to see for yourself.

With that in mind, I would like to invite you to go deep-sea fishing with me at the site Mobil Oil Corp. is considering for exploratory test drilling. If this meets with your approval, we will arrange it to fit your schedule.

This matter is of great importance to North Carolina. I have been wrestling with the issue of offshore drilling for many months, trying to balance our nation's fuel needs

with my unwavering conviction that we must preserve and protect our state's coast.

Your decision that our nation's oil and gas reserves are such that we can await a ten year moratorium on offshore exploration in non-producing areas convinces me that there is no need for North Carolina to be excluded from your moratorium. Since our state has the only oil or gas drilling site on the entire East Coast that wasn't included in your announcement, I respectfully request that the moratorium order be amended to include North Carolina.

I believe you will be able to get a strong grasp of the situation—as well as a marlin or king mackerel or two—if you can find time to join me. My fellow North Carolinians and I would be honored to show you personally the Atlantic waters we are committed to protecting.

Thank you very much, Mr. President, for your consideration.

Sincerely,
/s/ Jim Martin
JAMES C. MARTIN

[State Logo]

STATE OF NORTH CAROLINA
DEPARTMENT OF ENVIRONMENT, HEALTH,
AND NATURAL RESOURCES
DIVISION OF COASTAL MANAGEMENT
225 North McDowell Street
Raleigh, North Carolina 27602

James C. Martin, Governor
William W. Cobey, Jr., Secretary

Roger N. Schecter
Director

DRAFT

July 16, 1990

Mr. William C. Whittemore, Senior Counsel
Mobil Exploration & Producing U.S., Inc.
1250 Poydras Plaza
New Orleans, LA 70113-1892
Dear Mr. Whittemore:

This letter provides the State of North Carolina's official response to Mobil's April 17, 1990 consistency certification in which Mobil deemed its proposed discharge activities consistent with North Carolina's federally approved Coastal Management Program. Mobil's certification is for NPDES Permit Application Number NC 0052523, which describes proposed exploratory drilling discharge activities in Manteo Area Block 467, Lease OCS A-0236. The consistency certification was received by the State on 4/17/90 and assigned the number CD90-10 for review purposes.

Based upon our review of the certification and other information sources available (see Attachment 1), the State objects to Mobil's certification that the proposed activity is consistent with the North Carolina Coastal

Management Program. Our objection is based on Mobil's failure to provide data and information necessary to allow the State to conduct a proper consistency review of the proposal on its merits. The State's informational objections are made pursuant to 15 CFA Sections 930.54(e), 930.58, 930.60(a) and 930.64(d).

Since the Fall of 1988, North Carolina has expressed concerns to Mobil about informational deficiencies related to the proposed drilling activities in Manteo Area Block 467, Lease OCS A-0326. In December of 1989, Mobil was provided with a written list of fisheries studies viewed as essential by the Division of Marine Fisheries in order to address informational concerns related to assessment of all potential exploratory drilling impacts on fisheries resources. That study list was subsequently reduced to four parts which were more directly relevant to an assessment of potential drilling discharge impacts. The four part study was also set out in North Carolina's January 31, 1990 formal comments to EPA Region IV. The basic objectives of the four part study were further clarified in my letter to Mobil dated 4/12/90 (see Attachment 2). After discussions between Mobil and the State, the four part study was focused on discharge impacts and clarified once again (see Attachment 3) in Governor Martin's comments to EPA on 6/1/90 and supplemented by the Governor's letter of 7/13/90 to EPA (see Attachment 4). As of the date of this letter, the state has not received any of the site-specific fisheries data required by the four part study described above.

The State had previously determined that the NPDES permit activity may have potentially significant impacts on North Carolina's coastal resources. This position was substantiated by the U.S. Department of Commerce in their 10/11/89 letter granting permission to the State for a consistency review of Mobil's NPDES permit with a

finding that the activity "can be reasonably expected to affect the State's coastal resources" (see Attachment 5).

The State specified four North Carolina Coastal Management Program enforceable policies and standards particularly relevant to the NPDES permit consistency certification review process in our 4/12/90 letter to Mobil. These are extracted from the eight criteria listed in our federally approved 1979 Program Amendments which states that the criteria "will be used to judge the consistency of OCS development with the CM program." The four particularly relevant criteria are:

—Risks of environmental harm to fish spawning areas are assessed and minimized.

—Potential damage or interference with traditional fishing grounds or areas with high biological/recreational value (reefs, rock outcrops) is avoided.

—Placement of structures in geologically hazardous or biologically sensitive areas is avoided.

—Potential wildlife destruction or relocation is assessed and minimized.

The potential impacts of Mobil's proposed discharge activities upon the land and water uses of our coastal zone cannot presently be assessed against these four criteria because of the company's failure to provide the requested information. The requested information is necessary to allow proper determinations to be made regarding the biological importance of the proposed drill site area to the State's fisheries, the importance of the area to birds and marine mammals, and the economic importance of the proposed drill site area (which is located in or near the area locally known as "The Point") to the State's fishermen. Detailed review comments and analysis of the significance of the proposed drill site to biological resources by the Division of Marine Fisheries are attached (see Attachment 6).

Comments received from other State Resource Management Agencies during our current review of Mobil's consistency certification support our 4/12/90 conclusion that the information provided is insufficient. Our reviewers have also identified the following informational deficiencies and additional informational needs. Again, these informational needs are essential to our ability to successfully apply the four criteria listed above for judging the consistency of OCS development.

Mobil has used computer models to address the risks of environmental harm to fish spawning areas. The State has consistently maintained that the resources impacts cannot be documented or projected without adequate site specific baseline data. The four part fisheries studies are designed to provide the minimal site specific data which can reasonably be used to project probable impacts on fisheries resources from Mobil's proposed exploratory drilling discharges. Further, the State has maintained that Mobil has met fully documented assumptions used in their models and that the applicability of the models therefore cannot be judged (see comments provided by the Division of Environmental Management in Attachment 7 and the report prepared by Dr. Gerald S. Janowitz for the NC Outer Continental Shelf Office May 8, 1989 in Attachment 8).

The NC Division of Parks and Recreation pointed out that the use of *Fundulus heteroclitus*, a salt marsh, estuarine, and tidal creek species is unsuitable for determining toxicity of drilling muds to oceanic fish or invertebrates since, unlike oceanic species, *Fundulus* eggs, larvae, and adults are normally associated with high turbidities and sedimentation rates. Toxicity information must be provided for species adapted to the oceanic environmental conditions found at the proposed drill site.

The North Carolina Wildlife Resources Commission has determined that the following information is necessary to determine that potential wildlife destruction or relocation is assessed and minimized:

1. Utilization of the project site by pelagic birds, sea turtles and marine mammals. This should include information regarding numbers of individuals, numbers of species, and activities by species at the project site.
2. Past or ongoing research regarding impacts of oil and gas exploration discharges on wildlife resources.
3. Plans for remedial action if adverse impacts are detected once drilling activities are initiated.

Finally, EPA Region IV has informally indicated to Mobil and the State its intent to provide a "Response to Comments" document in which the agency will propose final discharge permit conditions, limitations, and prohibitions. As of this date, EPA Region IV has not issued this response. Therefore, in addition to the informational deficiencies outlined above, the State does not at this time know what EPA proposes for final discharge permit conditions, or whether EPA will impose the study requirements and other conditions itemized in the Governor's June 1, 1990 comments.

Because the State's objection is based upon Mobil's failure to provide necessary data and information, the only alternative available is for Mobil to provide the information needs identified. Should Mobil subsequently provide the required information, the State will then be in a position to review the proposed activity to determine whether it may be conducted in a manner consistent with North Carolina's Coastal Management Program.

This letter serves as our formal notice that we have found the proposed activity inconsistent with the North

Carolina Coastal Management Program. A copy will be sent to EPA Region IV as notification that pursuant to Section 307 of the Federal Coastal Zone Management Act of 1972, NPDES Permit Number NC0052523 cannot be issued. This letter also serves as notice to Mobil that our finding may be appealed to the Secretary, U.S. Department of Commerce, Washington, DC. The appeal must be filed within 30 days of receipt of this letter and must specifically address the applicant's belief that either (1) the activity is consistent with the objectives or purposes of the Federal Coastal Zone Management Act; or (2) the activity is necessary in the interest of national security.

Should you have questions regarding our finding or the appeal procedure, please contact me at (919)733-2293.

Sincerely,

/s/ Original signed by:
ROGER N. SCHECTER

Attachments

cc: Governor James G. Martin
Secretary William W. Cobey, Jr.
Secretary James S. Lofton
NC Outer Continental Shelf Office
NC Department of Justice
NC Division of Coastal Management,
Morehead Field Office
NC Division of Coastal Management,
Elizabeth City Field Office
NC Division of Environmental Management
NC Division of Marine Fisheries
NC Wildlife Resources Commission
NC Division of Parks and Recreation

Mr. Ray Cunningham
Water Management Division
EPA Region IV
346 Courtland Street
Atlanta, GA 30365

Mr. Timothy R.E. Keeney
U.S. Department of Commerce, OCRM
Washington, DC 20235

[DOI Logo]

THE SECRETARY OF THE INTERIOR
Washington

August 1, 1990

Honorable Ralph-Regula
House of Representatives
Washington, D.C. 20515

Dear Ralph,

The House Rules Committee will soon consider a rule for House consideration of the Conference Report to accompany H.R. 1465, the Oil Pollution Liability and Compensation Act of 1990.

I am informed an amendment (Sec. 6003), proposed by Representative Walter B. Jones of North Carolina, was added during the conference which would effectively delay any exploratory activity off the coast of North Carolina until late 1991. The Administration strongly opposes the inclusion of this amendment on the oil spill legislation since it is a de facto moratorium on any exploratory activity in this area, without regard to the relatively benign environmental effects of that activity.

The President has announced his comprehensive policy regarding Outer Continental Shelf (OCS) development and has placed a number of areas of the OCS off limits to further leasing, exploration, and development until the next century. The President's decision will restructure the OCS program by more carefully targeting areas with truly promising resource potential, obtaining information adequate to ensure that oil and gas development proceeds in an environmentally sound manner, and being sensitive to the concerns and needs of local areas affected by offshore

development. The Administration's actions are definitive efforts to resolve the near- and mid-term issues associated with offshore leasing. This amendment undermines this effort.

The Administration opposes the imposition of any additional legislative moratoria regardless of the legislative vehicle. I understand the amendment was not considered by the House or the Senate during debate on the oil spill legislation. The amendment is clearly outside the scope of the conference, and it should be deleted from the conference report.

I believe a rule should be granted which would allow for the removal of this amendment during consideration of the conference report by the House of Representatives.

Sincerely,

/s/ Manuel Lujan Jr.

EXPLORATION PLAN

ATLANTIC: OFFSHORE NORTH CAROLINA

MANTEO AREA BLOCK 467
OCS-A 0236

LESSEE/OPERATOR

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST INC. (MOEPSI)

20 AUGUST 1990

VOLUME 1 OF 3
EXPLORATION PLAN

EXECUTIVE SUMMARY

INTRODUCTION

In 1981, the Minerals Management Service (MMS) of the U. S. Department of the Interior conducted a Mid-Atlantic Region lease sale off the coast of the Carolinas. In this sale, Mobil and its partners bid on and successfully acquired 5 tracts for a total lease bonus of $234.8 million. Four of these five blocks were situated about 45 miles northeast of Cape Hatteras, North Carolina, and included Block 467, which received the highest bonus bid of the sale, $103.8 million.

In the fall of 1988, Mobil and partners informed the MMS and the State of North Carolina of their intent to drill a single exploratory well in Block 467. Considerable discussion ensued regarding regulatory procedures and environmental concerns. In lieu of requests by North Carolina for an unprecedented exploration stage Environmental Impact Statement (EIS), the State, MMS, and Mobil, in July 1989, entered into a Memorandum of Understand-

ing (MOU) which provided that the MMS would prepare an environmental report outlining potential impacts at both the exploration and production stages. Mobil and its partners also agreed to submit in advance a Draft Exploration Plan (EP), and the State agreed to conduct public hearings on this Draft Plan and to shorten the consistency review period for the Final EP.

On 1 September 1989, Mobil submitted its Draft EP to the MMS. Copies of the Draft EP were also provided to North Carolina state officials who placed copies in numerous public locations, so that citizens of North Carolina would have the opportunity to review and offer comments to Mobil on the proposed plan. After nearly a year of public review and comments and subsequent plan revision, Mobil, in accordance with Federal law and the special MOU, is now submitting the Final EP.

This document is organized in accordance with the format specified by federal regulations. The Final EP includes additional information made available since the submission of the original Draft EP Plan and effectively responds to various state and public concerns through expanded discussion and/or clarification of material presented in the Draft EP Plan. This executive summary is a condensed discussion of the EP's key components in layman's language.

PROJECT DESCRIPTION

Mobil proposes to drill a single exploratory well for natural gas at a site in Block 467 about 45 miles northeast of Cape Hatteras, North Carolina. The selection of this site is based on years of geological, geophysical, and environmental investigation, including efforts during the past 18 months on which Mobil and partners have spent more than $7 million. This well, which is planned to a total

depth of 14,000 feet, will be drilled by a state-of-the-art equipped drilling vessel, and will require about 3-4 months to complete. The wellsite, situated on the continental slope, is in 2,690 feet of water. The cost to complete this single well is estimated to be about $25 million.

Mobil proposes to use the existing facilities at the North Carolina Port in Morehead City as the shorebase for its exploratory drilling operations. No expansion of the port facility will be required, since existing channels and dockage are more than adequate to accommodate the anticipated traffic. Marine vessel support will include two cargo vessels (215-ft), one crew boat (125-ft), one utility vessel (120-ft), and one spill-response vessel (180-ft). The spill-response vessel will be stationed round-the-clock at the drillsite from start to finish of the drilling operations to insure protection in the unlikely event of a spill. The cargo and crew vessels will operate daily while the utility vessel will also remain at the drillsite. The Michael J. Smith Field, located in Beaufort, North Carolina, will be utilized by support helicopter operations. Air support will be provided by a twin-engine helicopter which will average two trips between the drillsite and shorebase per day.

TECHNICAL BACKGROUND

Geology

The area Mobil and partners propose to explore is located on the Norfolk Arch, a large east-west trending structural ridge extending off the North Carolina coast. The proposed wellsite is situated at the very crest of this large ridge. The target of this wildcat well is a porous rock composed of limestone which formed as part of an ancient reef trend. This reef, which existed over 140 million years ago along much of our Atlantic continental shelf, formed under conditions similar to those presently seen in the Great Barrier Reef off the east coast of Australia. To-

day, this long-dead reef is buried under approximately 8,000 feet of much younger sand and shale sediment.

Economic accumulations of gas or oil depend not only on effective traps, but also on close proximity of organic-rich source rocks. Geochemical analyses from nearby exploration wells have confirmed the presence of rock types capable of generating natural gas. Based on the structural and geochemical evidence, explorationists estimate that this particular reef structure could contain up to 5 trillion cubic feet of natural gas, or the energy equivalent of 1 billion barrels of crude oil. If proven to be the case, it would be the largest hydrocarbon discovery in the United States since the 1968 oil discovery of Prudhoe Bay, Alaska, and perhaps one of the largest single gas accumulations ever found in the lower 48 states, onshore or offshore.

Climate

Climatic conditions in this region are influenced primarily by the Bermuda-Azores high pressure system. In winter, this system migrates south which allows the frequent west to east progression of storm systems, some of which can be rather severe. As summer approaches, the Bermuda High shifts to the north, effectively deflecting regular cyclonic activity. Summer then is a time of relative stability, marked by high temperatures, low winds, and occasional bouts of showers or thunderstorms. Hurricanes can and occasionally do impact this region during the late summer or fall months, with the highest risk occurring in August and September. This exploratory well, however, will be initiated in May and completed by early August, however, which corresponds to the most stable weather window available.

Physical Oceanography

The proposed wellsite is in an area of rapidly changing bottom topography. The site itself is situated on the continental slope, which is the transition zone from the continental shelf in shallow water to the deep floor of the Atlantic Ocean. The slope off this portion of the Atlantic coast is cut by numerous east-west trending canyons and smaller ravines, and is the zone of active sediment transport from shallow to deeper water. At least three major ocean currents or water masses also converge in this area, the most dominant being the Gulf Stream. The western boundary of this huge current meanders back and forth across the area of the wellsite, with the prevailing flow from southwest to northeast. Mobil has and continues to perform current monitoring studies in the vicinity of the wellsite. The resulting information on current direction and maximum flow velocities has been utilized both to insure properly designed drilling equipment and for spill response planning.

Biology

The distribution of marine organisms occurring in the water column near the drillsite area is strongly influenced by the physical oceanography of the region. The type and quantity of small plant (phytoplankton) and animal (zooplankton) life depend on the water type present (Slope or Gulf Stream). These small organisms are a food source for larger species that in turn are eaten by larger organisms. Recreational and commercial fishing occurs in the area known as "The Point" (north of the drillsite) for billfish, dolphin, tuna, wahoo, and other species. Other marine animals, including whales, dolphins, turtles and seabirds, occur in the general area at various times of the year. Organisms at the sea surface include algae, (e.g., the brown algae *Sargassum*, protozoans, jellyfish, crustaceans, fish eggs and larvae, and other animals.

A site-specific photodocumentation survey of the bottom-dwelling (benthic) organisms was conducted in the drillsite and anchor areas by MOEPSI. The observed megafauna were numerically dominated by two species of fish (wolf eelpout and witch flounder) and a large anemone. Tubes of the colonial foraminiferan *Bathysiphon* sp. occurred in high densities on steep, seaward-facing slopes. Other recent studies in the general area also indicated high density and low diversity of organisms living on the bottom (infauna).

The water-column and bottom-dwelling organisms observed at the drillsite and anchor locations are neither unique nor endemic to the area, but rather have widespread distributions. In addition, the overall offshore area with similar biological characteristics is very large relative to the drillsite and anchor area.

POTENTIAL IMPACT FROM OFFSHORE ACTIVITIES

Much of the data collection and documentation was used to evaluate both potential impacts from normal exploration activities or impacts from unexpected occurrences such as accidents. Potential sources of such impact include:

- Drilling vessel anchoring and removal
- Presence of drilling vessel and submerged equipment
- Drilling fluid and cuttings discharges
- Other liquid discharges
- Air emissions
- Noise

Drilling Vessel

The drilling vessel utilizes a system of 8 large anchors to position and maintain itself over the wellsite. Deployment of this system will result in the anchors and attachment chains being dragged across the ocean bottom for short distances. The impacts will involve very small, localized portions of the sea floor, and a correspondingly small amount of fauna. Evidence from other offshore exploratory wellsites clearly indicates these impacts will be of short duration, and that the impacted areas will quickly recolonize by settling larvae and migrating adults from adjacent undisturbed areas.

In addition to small temporary impacts from anchors and chains, the surface presence of the drilling vessel for the projected 3-4 month period could cause some minimal disruption of recreational boating and commercial/recreational fishing. The proposed drillship is capable of rotating in any direction to face prevailing winds and waves, a maneuver which would effectively exclude only about 5 acres of ocean surface. This is obviously insignificant when compared to the hundreds of square miles utilized by fisherman in the general area. The anchor chains would not interfere with commercial or recreational fishing, because of the steep angle of descent and the extremely deep water at the site.

The drilling vessel and support boats have the potential to present obstacles to marine navigation. Support vessels will travel between the shorebase and drillsite on a daily basis, while the utility vessel and spill response-vessel will remain at the drillsite for the duration of the project. Although no designated vessel fairways pass through or in close proximity to Block 467, all vessels will operate in compliance with federal regulations, and the U.S. Coast Guard will advise all mariners of the drilling vessel loca-

tion. The probability of a vessel traffic accident due to the presence of the drillship or support vessels is extremely low.

Drilling Discharges

The discharge of drilling fluids and cuttings for all offshore wells is very carefully regulated by the U.S. Environment Protection Agency (EPA). Mobil has applied for a discharge permit for this well, and EPA is currently evaluating the potential environmental impact of the proposed discharges. Ultimately, it is the EPA which will establish the conditions for the type and quantity of allowable discharges, such that the overall impact to the surrounding marine environment will be minimized.

The actual toxicity of drilling fluids and cuttings has often been the subject of considerable debate. In reality, drilling fluid is nothing more than water mixed with natural clays, barite, (a naturally occurring mineral), and some minor chemical additives to maintain the mixture's consistency. Drill cuttings constitute nothing more than small pieces of the actual rock penetrated by the drillbit. The projected overall impact from these anticipated discharges is expected to be localized due to rapid dilution, and very minor in duration and overall extent. This assessment of impacts is consistent with the conclusions of the National Research Council (NRC). In a 1983 study entitled "Drilling Discharges in the Marine Environment," the NRC concluded "The environmental risks are small." The study panel was chaired by Dr. John D. Costlow of the Duke University Marine Laboratory in Beaufort, North Carolina. Also, air emissions from the drillship and related supply vessels will be small and well below acceptable levels established by federal regulations.

Noise

The noise from drilling operations, as with any ship, could potentially affect the behavior of marine mammals in minor ways, such as by avoidance of the immediate area and the temporary disruption of normal migratory patterns. Fish, seabirds, and sea turtles could also be affected by noise, but it is unlikely that such effects would be significant.

POTENTIAL IMPACTS FROM ONSHORE ACTIVITIES

Morehead City has been selected as the service base for this exploratory well. The daily operations of three marine support vessels will utilize the State Port at Morehead City while helicopter air support will be based out of Michael J. Smith Field in Beaufort. Supplies, including drillpipe, water and fuel, drilling mud and cement materials, and backup oil spill response equipment, will be transported by truck to Morehead City, and will require only about 4 acres of storage capacity, including room for vehicle and heavy equipment parking. A small trailer will serve as both office and living quarters for Mobil's shorebase operations manager. Additional shorebase personnel will include a marine foreman with four dispatchers and four local contract labor crews.

The expected level of onshore activity is not anticipated to have any adverse impact on the existing community, nor will it generate substantial new employment opportunities. This is consistent with a recent North Carolina Coastal Energy Impact Program study which concluded that "Temporary service bases involve minimal investment and provide little construction employment because of the tendency to locate in developed ports and use existing structures and facilities since temporary service bases are not

very large, they are not likely to have a significant impact on air and water quality, especially in a developed port."

PRECAUTIONS TO AVOID ACCIDENTAL SPILLS

The chances of a crude oil spill, or for potential damage to North Carolina's coast resulting from these proposed exploratory drilling operations, is extremely remote. The basis for such a statement is as follows:

- Our geologic knowledge, based on years of study and exploratory drilling on the U.S. east coast, clearly indicates that if any hydrocarbons have been generated, the product will be natural gas.
- Industry's safety record for offshore exploratory operations is virtually unblemished. Since moving offshore nearly 50 years ago, development of superior drilling equipment and technology has resulted in completion of over 8,000 exploration wells without a single crude oil spill from a blowout.
- As part to the proposed Exploration Plan, Mobil has designed the most comprehensive spill prevention and clean-up response. If an accidental spill of any kind were to occur, the maximum effort would be made to quickly contain and recover the spill.

Mobil has devised a comprehensive plan of clean-up response measures, which includes the following actions:

- A fully manned and equipped clean-up vessel stationed round-the-clock at the drillship from start to finish of the drilling operation. This vessel can handle spills of up to 1,000 barrels per 12-hour day.
- Back-up "state-of-the-art" equipment at Morehead City, with an additional clean-up capability of

1,000 barrels per 12-hour day that can reach the drillsite in 20 hours and intercept a spill a minimum of 12 hours before it reaches shore. Another system with 5,000 barrels per 12-hour day recovery capacity will be maintained at the shore base.

- A trailer pre-loaded with spill-response equipment located in the Oregon Inlet area.
- A procedure to commit additional national and international clean-up resources within a short period of time if necessary.

The factual evidence and past experience clearly suggests that an oil spill during drilling operations is very unlikely, and that a spill of any kind reaching the North Carolina coast is even more remote. Nevertheless, if an accident were to occur, Mobil and partners are clearly committed to whatever action is necessary to effectively contain and clean up a spill.

CONSISTENCY

Mobil's Consistency Determination (Appendix Q) provides an analysis of whether the proposed activities for Manteo Area Block 467 are consistent with the provisions of the North Carolina Coastal Management Program (NCCMP). Mobil's signed Certificate of Coastal Zone Consistency certifies that the proposed activities, described in detail in the Final EP, comply with the approved NCCMP and will be conducted in a manner consistent with the program.

CONCLUSION

The Exploration Plan for drilling this single exploratory well has been designed to minimize and mitigate, to the greatest extent possible, the effects of the project activities

on both the onshore and offshore environments. Our extensive geologic knowledge lends a high degree of certainty that this is a natural gas prospect. The planned drilling window corresponds to the most stable weather and current period. The existing literature on the aquatic life in the area has been extensively reviewed, and every known reasonable precaution has been planned to minimize impacts to this community from the discharge of cuttings and drilling fluids. Despite the low risk from an accident of spill, Mobil has designed one of the most comprehensive spill containment and clean-up measures ever contemplated by industry for an exploratory well. Finally, the very latest drilling and engineering technology will be utilized by Mobil, a company whose record of safety and environment concern is unsurpassed within the industry.

In addition to these efforts by Mobil, the MMS has developed extensive measures designed to minimize the overall impact of oil and gas activities. These measures include specific lease stipulations and regulations which must be strictly adhered to by Mobil.

Mobil is confident that by utilizing the procedures outlined in this Exploration Plan, the proposed exploratory well can be drilled safely and without any harmful impacts to North Carolina's valuable coastal resources.

PREFACE

This Exploration Plan follows the format specified in 30 CFR Part 250.33 (*Federal Register*, Vol. 53, No. 63, pp. 10704-10705), issued 1 April 1988. The Exploration Plan consists of three volumes, the contents of which are summarized below:

VOLUME 1

This volume is the Exploration Plan *per se* without supporting appendices. It includes descriptions of:

- the type and sequence of exploration activities
- the drilling vessel
- the location of the well
- the geologic structure of the area
- onshore facilities
- the history of weather conditions
- the oceanography of the site, including waves, tides, and currents
- onsite flora and fauna
- potential impacts of routine operations both onshore and offshore

VOLUME 2

This volume provides the supporting appendices for the Exploration Plan with more detailed information concerning:

- the drilling vessel and safety procedures
- the hydrogen Sulfide Contingency Plan
- endangered and threatened species
- fisheries statistics
- the modeling of drilling mud and cutting discharges
- the consistency determination

Volume 2 also includes the:

Geologic Hazards Report

This section contains:

- a description of sea floor conditions
- information on geologic features, including faults and possible gas
- an assessment of geologic conditions at wellsite
- an assessment of geologic conditions surrounding anchoring positions
- maps of the sea floor

"Live-Bottom" Survey

This section contains the results of the photodocumentation of the sea floor in the area of the drillsite and drilling vessel anchors.

VOLUME 3

This volume is the Oil Spill Contingency Plan, with attachments.

This document contains:

- information concerning the risk of oil spills
- an analyses of the trajectory of oil spills
- general response strategies for spills at the drillsite, in open waters and on shore
- information on response equipment
- containing a detailed description of the equipment, facilities, and companies to be used in implementing the Oil Spill Contingency Plan.

[DoI Logo]

UNITED STATES DEPARTMENT
OF THE INTERIOR

MINERALS MANAGEMENT SERVICE
Atlantic OCS Region
381 Elden Street, Suite 1109
Herndon, Virginia 22070-4817

Sep. 21, 1990

Mr. William C. Whittemore
Senior Counsel
Mobil Exploration & Producing U.S. Inc.
1250 Poydras Building
New Orleans, Louisiana 70113-1802

Dear Mr. Whittemore:

The recently passed Oil Pollution Act of 1990 contains provisions that specifically prohibit the Minerals Management Service from approving any Exploration Plan, approving any Application for Permit to Drill, or permitting any drilling offshore the State of North Carolina until at least October 1, 1991.

Consequently, the Minerals Management Service directs the Suspension of Operations on the 21 leases included in the Manteo Unit offshore North Carolina in accordance with 30 CFR 250.10(b)(7). These 21 leases are as follows:

Lease	Block Number
OCS A-0225	246
OCS A-0226	247
OCS A-0227	290
OCS A-0228	291
OCS A-0229	334

Lease	Block Number
OCS A-0230	335
OCS A-0231	378
OCS A-0232	379
OCS A-0233	422
OCS A-0234	423
OCS A-0235	466
OCS A-0236	467
OCS A-0237	510
OCS A-0238	511
OCS A-0239	553
OCS A-0240	554
OCS A-0446	555
OCS A-0242	597
OCS A-0243	598
OCS A-0244	640
OCS A-0448	641

The Suspension of Operations is effective August 18, 1990, the day the Oil Pollution Act of 1990 was signed into law. The suspension will expire when the statutory prohibitions contained in the Outer Banks Protection Act are no longer in force.

The terms of all leases under suspension because of this legislation will be extended for a period of time equal to the period the suspension is in effect (30 CFR 250.10(f)). No payment of rental is required during the period of this directed suspension (30 CFR 218.154(a)).

By copy of this letter, we are informing the other seven participants in the Manteo Unit of our decision.

Sincerely,

/s/ Lawrence H. Ake
LAWRENCE H. AKE
Acting Regional Supervisor,
Field Operations

cc: Amerada
Chevron
Conoco
Marathon
Oxy
Shell
Union
MMS Royalty Management
(Unit Agreement No. 752-290001-0)
(RMP Attn: FAD/RDB Paula Bearfoot)

[DoI Logo]

UNITED STATES DEPARTMENT
OF THE INTERIOR

MINERALS MANAGEMENT SERVICE
Atlantic OCS Region
381 Elden Street, Suite 1109
Herndon, Virginia 22070-4817

Sep. 21, 1990

Amerada Hess Corporation
1201 Louisiana, Suite 700
Houston, Texas 77002-5681

Gentlemen:

According to our records, you obtained interest in one or more leases on the Atlantic OCS offshore the State of North Carolina during Atlantic Lease Sales 56, RS-2, or 78 (see enclosed list). The recently passed Oil Pollution Act of 1990 contains provisions that specifically prohibit the Minerals Management Service from approving any Exploration Plan, approving any Application for Permit to Drill, or permitting any drilling offshore the State of North Carolina.

As authorized by the regulations codified at 30 CFR 250.10(b)(7), the Minerals Management Service hereby directs a Suspension of Operations (SOO) for those leases indicated on the enclosed list. The SOO is granted effective August 18, 1990, the day the Oil Pollution Act was signed into law. The SOO will expire when the statutory prohibitions contained in the Outer Banks Protection Act are no longer in force.

The terms of all leases under suspension because of this legislation will be extended for a period of time equal to the period the suspension is in effect (30 CFR 250.10(f)).

No payment of rental is required during the period of this directed suspension (30 CFR 218.154(a)).

Sincerely,

/s/ Lawrence H. Ake
LAWRENCE H. AKE
Acting Regional Supervisor,
Field Operations

Enclosure

cc: MMS Royalty Management (RMP Attn: FAD/RDB
Paula Bearfoot)

bcc: FO File
AOCS Chron
L. Ake

LMS:AOCS:Mail Stop 6000:LAke:la:09/20/90

IDENTICAL LETTER SENT TO AMOCO, CHEVRON, CONOCO, MARATHON OIL, MOBIL OIL, MURPHY OIL, ODECO, OXY USA, SHELL, AND UNOCAL.

Enclosure

AMERADA HESS CORPORATION

LEASE #	PERCENT
0220	33.33300
0234	33.33300
0236	33.33300
0238	33.33300
0240	33.33300

Enclosure

AMOCO PRODUCTION COMPANY

LEASE #	PERCENT
0258	33.33333
0263	33.33333
0266	33.33333
0267	33.33333
0268	33.33333
0269	33.33333
0445	100.00000
0447	100.00000
0450	100.00000

Enclosure

CHEVRON U.S.A. INC.

LEASE #	PERCENT
0221	33.33334
0226	33.33334
0228	33.33334
0231	50.00000
0232	33.33334
0233	50.00000
0235	66.66667
0237	50.00000
0239	33.33334
0242	33.33334
0249	100.00000
0250	100.00000
0258	66.66667
0263	66.66667
0266	66.66667
0267	66.66667
0268	66.66667
0269	66.66667
0376	100.00000
0446	50.00000
0448	100.00000

Enclosure

CONOCO INC.

LEASE #	PERCENT
0221	33.33333
0222	25.00000
0223	50.00000
0224	50.00000
0225	100.00000
0226	33.33333
0227	100.00000
0228	33.33333
0229	50.00000
0230	50.00000
0231	50.00000
0232	33.33333
0233	25.00000
0237	25.00000
0239	33.33333
0242	33.33333
0243	25.00000
0244	100.00000
0254	50.00000

Enclosure

MARATHON OIL COMPANY

LEASE #	PERCENT
0220	33.33300
0234	33.33300
0236	33.33300
0238	33.33300
0240	33.33300

Enclosure

MOBIL OIL EXPLORATION &
PRODUCTION SOUTHEAST

LEASE #	PERCENT
0220	33.33400
0234	33.33400
0236	33.33400
0238	33.33400
0240	33.33400

Enclosure

MURPHY OIL USA, INC.

LEASE #	PERCENT
0247	50.00000
0248	50.00000
0261	50.00000
0264	50.00000
0265	50.00000
0449	50.00000

Enclosure

ODECO OIL & GAS COMPANY

LEASE #	PERCENT
0247	50.00000
0248	50.00000
0261	50.00000
0264	50.00000
0265	50.00000
0449	50.00000

Enclosure

OXY USA INC.

LEASE #	PERCENT
0222	12.50000
0233	12.50000
0237	12.50000
0243	12.50000

Enclosure

SHELL OFFSHORE INC.

LEASE #	PERCENT
0222	12.50000
0233	12.50000
0237	12.50000
0243	12.50000
0372	100.00000
0440	100.00000
0441	100.00000
0442	100.00000
0443	100.00000
0444	100.00000

Enclosure

UNOCAL EXPLORATION CORPORATION

LEASE #	PERCENT
0221	33.33333
0222	50.00000
0223	50.00000
0224	50.00000
0226	33.33333
0228	33.33333
0229	50.00000
0230	50.00000
0232	33.33333
0235	33.33333
0239	33.33333
0242	33.33333
0243	50.00000
0251	100.00000
0254	50.00000
0255	100.00000
0446	50.00000

Atlantic Outer Continental Shelf

ENVIRONMENTAL ASSESSMENT OF EXPLORATION PLAN FOR MANTEO AREA BLOCK 467

Operator: Mobil Oil Exploration & Producing Southeast Inc.

Plan Type: Exploration

Lease: OCS-A 0236

Block: NI 18-2-467

U.S. Department of the Interior
Minerals Management Service
Atlantic OCS Region
Environmental Assessment Section
381 Elden Street, Suite 1109
Herndon, VA 22070-4817

September 28, 1990

* * * *

VII. *Finding of No Significant Impact (FONSI)*

In the preceding pages of this EA the MMS has examined the impacts of the proposed action, the drilling of one exploratory well on NI 18-2 Block 467. The following is a summary showing the evaluation of these impacts and lists specific references to the EA which support each determination of "no impact" or "no significant impact".

CEO Parameter 40 CFR 1508.27(b)	Severity of Impact Level/Degree of Significance	EA Page and Paragraph Ref.
1. Beneficial and/or adverse effects.	NS •	pp. 49-75 pp. 83-84
2. Public health and safety.	NS	pp. 11 & 12 para. 1-4 pp. 49-51
3. Unique characteristics of the geographic area.	NI •	
4. Effects highly controversial.	NS	p. 85
5. Highly uncertain effects or unique or unknown risks.	NS	Appendices E & F
6. Establishes precedent for future actions or is a decision in principle about a future action.	NI	
7. Assessment of cumulative actions and impacts thereof. Note 400 CFR 17.	NS	pp. 49-75
8. Effects on districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historical Places or may cause loss or destruction of significant scientific, cultural, or historical resources.	NI	p. 65 para. 6 p. 66 p. 67 para. 1 p. 71 para. 3 & 4

9. Effects on endangered or threatened species or their habitat that have been determined to be critical under the Endangered Species Act of 1973.	NS	p. 57 para. 5-p. 63 para. 2
10. Threatens a violation of Federal, State, or local laws or requirements imposed for the protection of the environment.	NI	

[a] No significant impact
[b] No impact

VIII. *Environmental Assessment Determination*

In my opinion, approval of Mobil Oil Exploration & Producing Southeast, Inc.'s proposed action involving the drilling of one exploratory well on NI 18-2, Block 467, described in this Environmental Assessment, does not constitute a major Federal action significantly affecting the quality of the human environment as defined by the National Environmental Policy Act (NEPA), Section 102 (2)(c) and 40 CFR 1500 to 1508. In rendering this opinion, I have given special consideration to 30 CFR 250.34-4 (compliance with NEPA).

/s/ [Illegible] — 9/28/90
Regional Supervisor, — Date
Leasing and Environment
Atlantic OCS Region

I concur and determine that an Environmental Impact Statement will not be prepared for this action.

/s/ Bruce G. Weetman — 9/28/90
Regional Director, — Date
Atlantic OCS Region

[State Logo]

STATE OF NORTH CAROLINA
DEPARTMENT OF ENVIRONMENT, HEALTH, AND NATURAL RESOURCES
Division of Coastal Management
225 North McDowell Street
Raleigh, North Carolina 27602

November 19, 1990

James G. Martin, Governor — Roger N. Scheeter
William W. Cobey, Jr., Secretary — Director

Mr. Bruce G. Weetman, Regional Director
USDI Minerals Management Service
Atlantic OCS Region
381 Elden Street, Suite 1109
Herndon, VA 22020

Dear Mr. Weetman:

This letter provides the State of North Carolina's official response to Mobil Oil Exploration & Producing Southeast Inc.'s August 10, 1990 consistency determination contained in Appendix Q of the Final Exploration Plan—Manteo Area Block 467—Offshore Atlantic (EP). The determination contained a certification that the "activities described in detail in the Plan comply with the approved North Carolina Coastal Management Program and will be conducted in a manner consistent with such a Program." The North Carolina Division of Coastal Management received the determination and Exploration Plan on September 5, 1990 under your cover letter dated August 30, 1990 to Governor James G. Martin. We assigned the determination the number CD90-23 for review coordination purposes.

Based upon our review, we object to Mobil Oil Exploration & Producing Southeast Inc.'s certification that the proposed activities described in its final EP will be conducted in a manner consistent with the North Carolina Coastal Management Program (NCCMP). Pursuant to 15 CFR Sections 930.56(b), 930.58, 930.75(b), 930.77(b), and 930.79(c) our objection is based on Mobil's failure to meet and/or provide adequate information to address the following criteria set forth in the approved North Carolina Coastal Management Program.

- Risks of environmental harm to fish spawning areas are assessed and minimized.
- Potential damage or interference with traditional fishing grounds or areas with high biological/recreational value (reefs, rock outcrops) is avoided.
- Placement of structure in geologically hazardous or biologically sensitive areas is avoided.
- Potential wildlife destruction or relocation is assessed and minimized.

The Division of Marine Fisheries (See Attachment CD90-23-1) and Outer Continental Shelf Office (See Attachment CD90-23-2) have identified deficiencies related to the above criteria in Mobil's Exploration Plan. These include, but are not limited to, the deficiencies summarized below:

1) Though state reviewers have stressed the need for site-specific data in order to determine whether or not proposed activities comply with these criteria, Mobil has failed to provide it. Regarding fisheries resources, the EP states on page 212-45 that "The following description relies mostly on general rather than site-specific information".

2) While the document provides a more thorough review of the literature than previous documents, the EP does not adequately recognize or address the significant and diverse biological, recreational, and commercial resources characteristics of the proposed drillsite. These include oceanic fish and gamefish, marine mammals, and seabirds.

3) Larval fish data provided were collected from north and south of the site and may not relevant to environmental conditions and ecology at the proposed drillsite.

4) Larval fish data provided are not relevant to the proposed summer drilling season.

5) The Exploration Plan does not adequately recognize or address the significant benthic biological community even though the community in the general area has been documented as the most abundant on the Atlantic Continental Slope and Rise.

6) The EP fails to recognize or provide information on the relationship of "The Point" and potentially significant impacts to the coastal zone regarding commercial and recreational fishing fleets utilizing the area and subsequent socio-economic and tourism effects.

- Risks of spills from OCS operations and possible trajectories are evaluated and appropriate mitigation measures employed.

The Division of Environmental Management (See Attachment CD90-23-3) and Outer Continental Shelf Office (Attachment CD90-23-2) have identified deficiencies related to the above criteria in Mobil's oil spill contingency plan component of the EP. These include, but are not limited to, the deficiencies summarized below:

1) The model-generated trajectory relies too heavily on circulation models which have insufficient validation and calibration by field ~~data~~ at the site. Data north and west of the drillsite on shelf circulation and water mass transport toward shore, which are essential to proper oil spill risk analysis, are lacking. An independent panel recently recommended that two years of field observations be collected to fill these data gaps.

2) The assurance of the availability of cleanup equipment and supplies is not documented.

3) The EP relies on equipment not capable of performing under expected physical conditions (Expandi 4300 Oil Boom) even where more suitable equipment (Expandi Ocean Boom 7000) is available from the same manufacturer.

4) There is a need to consider deploying some additional specialized equipment such as an offshore fire boom on the dedicated on-site vessel.

5) Response times specified in the EP are too long to contain a spill of significant magnitude especially under adverse weather conditions. There is a need to reevaluate the type of equipment and the deployment strategy to insure an appropriate response time.

6) The use of chemical dispersants continues to be controversial. Though the EP relies heavily on the use of dispersants, Mobil has failed to seek or obtain the required pre-approval from the NC Enivronmental Management Commission for their use in state waters.

7) The EP fails to consider less toxic dispersants than Corexit 9527 such as Corexit 9580.

8) There is a need to consider other chemical strategies in addition to dispersion which should be used as

a last resort. These include at a minimum herding agents, gels, biodegradation agents, and emulsion preventers and breakers.

9) The EP states that special additives may be used such as biocides, diesel or other oils for lubrication, polyacrylamide, etc. Toxicity of these additives is a very strong concern of the state and the plan fails to adequately assess effects at the site. Toxicity data in the EP are developed from shallow water species not related to the drillsite.

10) The EP needs to address the new OSHA 1910.120 regulations requiring special training for all spill responders.

11) The EP fails to adequately address disposal of collected oil. The EP simply indicates that no plans are presently available.

12) The EP fails to address emergency permitting requirements for clean up activities.

In addition to failing to meet these criteria listed above, the Exploration Plan lacks sufficient information to determine compliance with OCS and Water and Air policies listed in the approved NCCMP (See Attachment CD90-23-3).

On July 17, 1990, the State objected to Mobil Oil Exploration & Producing Southeast Inc.'s NPDES consistency certification for the discharge activities associated with the proposed exploration well currently the subject of the Manteo Area Block 467—Offshore Atlantic Exploration Plan (See Attachment CD90-23-4). This objection was primarily based upon the failure by Mobil to provide site-specific fisheries information or other information necessary to resolve the "area of biological concern" (ABC) issue. As the fisheries information requested

has still not been provided, the proposed discharge activities remain inconsistent with the North Carolina Coastal Management Program.

The NC Division of Environmental Management (DEM) provided detailed comments on May 15, 1990 on the Draft NPDES permit issued by the Environmental Protection Agency (EPA). Since the draft permit has not changed to date, the previous comments continue to be recommended by DEM and are included in Attachment CD90-23-5.

On September 21, 1990, Governor Martin submitted comments to Minerals Management Service pursuant to the Outer Continental Shelf Lands Act (See Attachment CD90-23-6). While the Governor's OCSLA comments do not represent North Carolina's official consistency position, they underscore specific information inadequacies and unresolved issues described above such as oil spill contingency and areas of biological concern.

North Carolina has expressed concerns to Mobil about informational deficiencies related to the proposed drilling activities in Manteo Area block 467, Lease OCS A-0326 since the fall of 1988. Guidance on information needs and deficiencies has been provided in our past correspondence and in reviews of draft documents related to this activity. Several of our concerns have been addressed in the final EP. The Division of Land Resources, for example, has determined that their initial concerns about geologic hazards have been adequately addressed in the final EP. Moreover, to the extent that these deficiencies and information needs have not been addressed adequately by the EP, this letter constitutes a continuing statement of information needs and a request for such information pursuant to 15 CFR 930.58 and 15 CFR 930.56.

A number of alternatives have ben suggested by our reviewers as required by 15 CFR 930.79(c) and 930.64 (b)(2) (See Attachment CD90-23-2). However, we feel that the only alternative presently available to Mobil, where our objection is based upon a failure to provide necessary data and information, is to provide the information needs identified necessary to adequately assess consistency with the NCCMP. Should Mobil provide this required information, including relevant information needs identified by the Outer Banks Protection Act Review Panel, the State will then be in a position to review the proposed activity to determine whether it may be conducted in a manner consistent with North Carolina's Coastal Management Program.

This letter serves as our formal notice that we have found the proposed activity inconsistent with the North Carolina Coastal Management Program. A copy will be sent to Mobil Exploration & Producing Southeast, Inc. to serve as notice to Mobil, pursuant to 930.74(c), that our finding may be appealed to the Secretary, U.S. Department of Commerce, Washington, DC. The appeal must be filed within 30 days of receipt of this letter and must specifically address the applicant's belief that (1) the activity is consistent with the objectives or purposes of the Federal Coastal Zone Management Act, and/or (2) the activity is necessary in the interest of national security.

Should you have questions regarding our finding or the appeal procedure, please contact me at (919) 733-2293.

Sincerely,

/s/ Roger N. Schecter
ROGER N. SCHECTER

Attachments

cc: Governor James G. Martin
Secretary William W. Cobey, Jr.
Secretary James S. Lofton

Mr. James C. Martin, Manager
Environmental, Regulatory, and Loss Prevention
Mobil Exploration & Producing U.S. Inc.
PO Box 650232
Dallas, TX 75265-0232

NC Outer Continental Shelf Office
NC Department of Justice
NC Division of Coastal Management, Morehead City Office
NC Division of Coastal Management, Elizabeth City Office
NC Division of Environmental Management
NC Division of Marine Fisheries
NC Wildlife Resources Commission
NC Division of Land Resources
NC Division of Parks and Recreation

Mr. Timothy R.E. Keeney
U.S. Department of Commerce, OCRM
Washington, DC 20235

REPORT

to

THE SECRETARY OF THE INTERIOR

from the

NORTH CAROLINA

ENVIRONMENTAL SCIENCES

REVIEW PANEL

as

MANDATED BY THE OIL

POLLUTION ACT OF 1990

January 22, 1992

EXECUTIVE SUMMARY

INTRODUCTION

Background

The Oil Pollution Act of 1990, in a section cited as the Outer Banks Protection Act, prohibits the Secretary of the Interior from proceeding with a number of actions relative to development of oil and gas resources offshore North Carolina for which he is responsible under the Outer Continental Shelf Lands Act (OCSLA). Actions prohibited include: (1) conducting a lease sale; (2) issuing any new lease; (3) approving any exploration plan; (4) approving any development and production plan; (5) approving any application for permit to drill; and (6) permitting any drilling. The prohibition on these actions is mandated to remain in effect until the later of: (1) October 1, 1991 or (2) 45 days of continuous session of the Congress following the submission of a written report from the Secretary certifying that the information available to him is sufficient to carry out his responsibilities under the OCSLA.

In his report, the Secretary is required to take into consideration findings and recommendations of a panel established by the Outer Banks Protection Act, the North Carolina Environmental Sciences Review Panel, and to include a detailed explanation of any differences between his certification of sufficient information and the findings and recommendations of this group. The Panel is charged by the Act with: (1) assessing the adequacy of the available physical oceanographic, ecological, and socioeconomic information to enable the Secretary to fulfill his responsibilities under OCSLA and (2) identifying any additional information deemed essential to enable the Secretary to carry out these responsibilities. The Panel's response to this charge is the subject of this document.

Organization of the Review Process

As provided by the Outer Banks Protection Act, the North Carolina Environmental Sciences Review Panel is composed of five members, a marine scientist selected by the Secretary of the Interior, a marine scientist selected by the Governor of North Carolina, and three scientists, one each from the disciplines of physical oceanography, ecology, and social sciences, selected jointly by the Secretary and the Governor from a list developed by the National Academy of Sciences.

The first meeting of the Panel was on January 28, 1991. This and subsequent Panel meetings were devoted to discussing and reaching agreement on the functioning of the group, an appropriate definition for adequacy of information, the scope and structure of the required report, conclusions regarding adequacy of information, and recommendations for implementing additional studies. To develop the report, individual Panel members carried out extensive reviews of available information, developed draft sections, and contributed to detailed discussions regarding revisions. All conclusions presented in the report were thoroughly considered at one or more Panel meetings. Unless specifically indicated in the text, the conclusions and recommendations presented in the report represent the unanimous decision of the Panel members. All meetings were announced in the Federal Register and were open to the public.

Geographic Area Considered

The Panel is directed to consider the adequacy of information for making decisions regarding oil and gas leasing, exploration, and development on the lands of the Outer Continental Shelf (OCS) offshore of North Carolina. There are presently 53 lease blocks in this

area for which there are active leases for oil and gas resource identification and development. These leases were sold in 1981, 1982, and 1983 by the Department of the Interior's Minerals Management Service (MMS) and the Bureau of Land Management (BLM), MMS's predecessor organization.

Additional lease blocks are currently under consideration for leasing as part of a proposed 5-year (1992-1997) program of lease sales (U.S. DOI, 1991b). There is also one request presently pending which seeks approval of a plan for drilling one exploratory well in Manteo Area Block 467 (the Manteo site). This site is being proposed for drilling to test for oil and gas resources, not only in Block 467, but also in a wider, unitized Exploration Unit which includes this block and 20 other contiguous leased blocks (the Manteo Unit). Given the strong interest and public concern regarding this proposed exploratory well, the Panel especially focused on assessing the adequacy of information in the documents (U.S. DOI, 1990a; 1990b) which were developed by MMS specifically to support decision-making regarding oil and gas resource development for this site. However, the Panel's report also includes a separate, broader and more general, consideration of the adequacy of information for the other parts of the OCS offshore of North Carolina, especially areas south of Cape Hatteras.

Adequacy of Existing and Need for Additional Information

A recent National Research Council (NRC, 1989) report evaluates the adequacy of the existing environmental information to support decision-making regarding development of oil and gas resources on the OCS of Florida and California. The NRC report uses a definition which

judges adequacy on the basis of the completeness and scientific rigor of the available information. The Panel concluded that it was appropriate to adopt a consistent definition that judges adequacy using the same two elements.

The Panel notes and endorses recent changes in the focus of the Environmental Studies Program of MMS, which were catalyzed in part by a NRC review conducted some time ago (NRC, 1978). However, the Panel also concurs with a more recent NRC evaluation (NRC, 1989) which emphasizes the continuing need for a still greater commitment to the support of process-oriented studies by this program to assess potential impacts of OCS activities.

CONCLUSIONS

Area of Manteo Block 467

General information relating to the physical oceanography and ecology in the vicinity of Manteo Block 467 has been presented in the DOI decision documents for oil and/or gas resource development at this site. However this information is not sufficiently quantitative or process-oriented to provide an adequate understanding of potential impacts related to such development. Socioeconomic information for all phases of development activity ranges from inadequate to non-existent.

Although adequate in many respects for providing needed physical oceanography information, the present OSRA model is deficient in several aspects, including the failure to account for effects of short-term fluctuations in Gulf Stream dynamics. Simple estimates of errors associated with known current variability can make OSRA adequate for decision-making for exploration, however. Information is inadequate relating to flow over the shelf

north of Cape Hatteras, how oil from a spill at the Manteo Site may tend to concentrate along the Gulf Stream front, and how oil would disperse from the site of a potential pipeline rupture or tanker accident away from the drill site. With regard to the behavior of oil within the surf zone, the inlets, or the estuarine systems enclosed within the barrier islands, information is not as good as desirable, but it is adequate to assume that oil which approaches the coast will either beach or enter an estuary. Adequate information is presented on the fates and effects of drilling muds and cuttings as well as the secondary release of small amounts of contaminants from platforms or vessels.

A number of inadequacies of ecological information were identified in the DOI decision documents relating to all phases of exploitation of oil and gas resources. These result from incomplete ecological information and flawed interpretations rather than from failure to incorporate available information within the documents. Major inadequacies include absence of understanding of: (1) how physical/biological couplings drive intense utilization by top carnivores near the Manteo site, especially in the highly productive area identified as "the Point"; (2) the role of the Gulf Stream *Sargassum* community as vital habitat, not only for the reproduction and young of a number of recreationally and commercially important fishes, but also for juveniles of the five species of turtles identified in the Endangered Species Act; (3) the potential impacts of development on the benthic community adjacent to the Manteo Site; (4) impacts of an oil spill on the overwintering striped bass populations along the shallow waters off the Outer Banks; and (5) the mechanisms of transport, deposition, and impact of spills on the large offshore shoals found at the North Carolina capes.

Within the socioeconomic presentations in the DOI decision documents, there is little or no attempt to establish connections among social scientific variables or between these and physical and natural scientific properties or to analyze such relationships. For example, the effect of OCS-related activities on specific fish stocks, specific recreational or commercial fishermen who exploit such fish stocks, and the communities and industries that are dependent upon such activity are not fully characterized or analyzed. The potential impact of changing perceptions and attitudes concerning the marine and coastal environment on behavior patterns are another example of such relationships that are not fully characterized or analyzed. The general assumption contained within the DOI decision documents is one of "no significant impact", a conclusion which may be warranted for certain aspects of the exploration/delineation phase, but is not justified beyond this for the development/production phase nor, for that matter, for the exploration/delineation phase as a whole. All OCS activity, especially during development and production such as has occurred in Alaska, Louisiana, and California, has a significant impact on the human environment including socioeconomic systems (Petterson *et al.*, 1983; Wolf, 1991; Yarle, 1983). Whether or not we judge this impact to be, on balance, positive or negative is not the point here: the point is that there are significant impacts which must be adequately characterized and analyzed. Virtually all of the analyses relating to the costs and benefits of the proposed OCS activities do not warrant the conclusions presented in the DOI documents.

North Carolina OCS

Within the broad area of the North Carolina OCS, information on the physical oceanographic, ecological,

and socioeconomic aspects is generally less adequate than that available for the Manteo site, largely because these areas are less well studied and the DOI decision documents were not developed with these areas as the primary focus. Physical oceanographic information was deemed inadequate relative to accidents and the possible distribution of oil spills.

Although much of the ecological information available regarding development at Manteo Block 467 is applicable to leasing in the North Carolina OCS area, inadequacies identified for that site are equally relevant to the North Carolina OCS. Additionally the available information is deemed inadequate to support leasing on the North Carolina OCS with regard to: (1) the role of ocean physics in determining the reproductive success of fish and shellfish in this region, (2) inventories of the seabirds present and the mechanisms controlling their abundances; (3) the distributions of cetaceans and turtles, especially the threatened and endangered ones; and (4) particularly for the area south of Cape Hatteras, information concerning primary and secondary production. Additionally, site-specific issues, including questions concerning appropriate monitoring studies, can be expected to arise, but these cannot be identified in advance of completion and analysis of recommended studies associated with the leasing phase and of further information on specific sites.

Conclusions relating to the adequacy of socioeconomic information within the Manteo site decision documents also apply to the entire North Carolina OCS. However, there are considerably less data and information available that pertain to this broader region and thus, an even greater need exists for developing comparable data and information.

RECOMMENDED STUDIES

Area of Manteo Block 467

Specific studies are identified within the physical oceanographic, ecological, and socioeconomic areas for each of the four phases of operation.

Recommended studies in physical oceanography include the following:

(1) Development of improvements in OSRA specifically designed to provide better current field estimation and to better account for the effects of Gulf Stream meanders and cold dome eddies. Such improvements are currently under development.

(2) Development of OSRA submodels focusing on the nearshore regions of barrier islands, inlets, and estuarine regions inshore of the Outer Banks. Such an improvement is desirable, but not likely to be available in the near future.

(3) Major field efforts to characterize the current fields of the northern North Carolina shelf and of the region south of Cape Hatteras between the shelf and the Gulf Stream. The former study is underway and the second is only required if oil and gas developmental activities are to take place south of the Manteo block.

Also, in the event that it is demonstrated that the Gulf Stream frontal regions are critical habitats. It will be desirable to conduct studies of frontal convergence. These studies are needed only for development at the Manteo site as the presently available information is adequate for decision-making regarding exploration at this site. For the exploration phase at the Manteo site, the field studies called for in Item #3 above will not be required if OSRA

can be shown to include realistic time-varying subsurface currents.

Recommended studies in the area of ecology include the following:

(1) Development of an understanding of the oceanographic and ecological processes acting on the North Carolina continental shelf and slope, largely to explain the functional basis for the distinctively intense use in the area of "the Point" by higher [illegible] level consumers. These studies should be initiated immediately and completed before delineation, but the initial exploration need not be delayed.

(2) An investigation on the dynamics of the *Sargassum* community focusing on the degree to which it represents a major habitat for sea turtles and in the recruitment of commercially and recreationally important pelagic fishes. This study should begin immediately and be completed before delineation.

(3) A survey of the benthic community in the area of the Manteo site to determine the geographic extent of the unusual aggregation of organisms in this region and, depending upon the extent, further studies to determine the recovery rate of these organism if covered by drilling discharges. The survey portion should be undertaken immediately and should be completed before exploration begins.

(4) Monitoring studies to determine possible increases in hydrocarbon levels within several indicator organisms, including *Sargassum*, one or two associated animals, and the Wilson's storm petrels.

The following studies dealing with the socioeconomics area should each require about one year and all should be completed before further permits are issued:

(1) Base case characterization analyses for the Manteo area. These should include not only standard aggregate data base analyses, but also characterization of the structure of relevant industries and the relationships among the private and public sector entities potentially affected by development of oil and gas resources in this area.

(2) Community studies involving the communities most likely to be affected by development at the Manteo site. These studies should cover the sociocultural variables necessary for developing a contextual understanding of the role and effect of potential OCS activities in these communities.

(3) Pre-OCS activity perceptions of environmental conditions and values associated with potential oil and gas development at the Manteo site.

(4) Infrastructural impacts of development at the Manteo site including consideration of the impacts on all potentially affected areas related to revenue sources, distribution of financial burdens, and certain sociopolitical variables.

(5) Design of a comprehensive, longitudinal socioeconomic monitoring program which should be implemented prior to the issuance of drilling permits.

These recommended studies are focused primarily on the needs for socioeconomic information to support the leasing and exploration phases. For the development/production phase, similar studies will be needed, but ones that are significantly increased in the breadth and depth of the geographical areas and magnitude of impacts considered.

Socioeconomic studies are also recommended specifically for the post-production phase; these should be de-

signed to consider questions about the maintenance of the infrastructure developed because of OCS production, the displacement effects for employees of related industries, and the restoration of replacement of pre-developmental activities and human environments.

North Carolina OCS

In light of the fact that there is much less information available for Panel review pertaining to the potential [illegible] development on the North Carolina OCS than for the specific area of the Manteo site, expanded versions of most of the studies recommended for that site would be required to provide adequate information on physical oceanography, ecology, and socioeconomics over the North Carolina OCS.

The additional physical oceanographic studies should include the following:

(1) Detailed assessments using OSRA calculations and an evaluation of their potential errors for all sites under consideration for leasing (required for leasing phase);

(2) Current meter measurements at potential drilling sites and at locations away from these sites that will provide improved information with which to estimate the fate of spills both at the sites and from service vessels along their paths to the sites (required for exploration phase); and

(3) Expanded shelf circulation studies of the region through which gas and/or oil will be transported from producing wells (required for development phase). (This item may be unnecessary if OSRA is proven to incorporate realistic time-varying subsurface currents.)

Additional studies involving ecology should include the following:

(1) The development of a better understanding of the relation between cross-shelf water movements and the reproductive success of estuarine-dependent fishes and shellfish that use the shelf for reproduction;

(2) A survey of the seasonal patterns in distribution and abundance of seabirds in relation to circulation patterns; and

(3) An expansion of the ongoing South Atlantic assessment of the occurrence of marine mammals and sea turtles to include all of the area offshore North Carolina.

Other ecological studies will likely be required, but these can only be defined after specific sites for drilling have been proposed.

The recommended socioeconomic studies all involve expansion of the studies that have already been recommended for the Manteo site. These expanded studies will need to be tailored to the specific sites and socioeconomic systems involved with the OCS activities under consideration.

It is also recommended that MMS obtain and use a Geographic Information System for the area of the North Carolina OCS to facilitate the identification, assemblage, review, and analysis of the considerable body of scattered information and data available for this area.

A summary of the studies recommended by the Panel to initiate decision-making at each of the four phases is presented for the Manteo Site and for the North Carolina OCS in Table 1.

[Copy Illegible]

PHASE	MANTEO SITE	NORTH CAROLINA OCS
Leasing	(As leasing has already been carried out for the area of the Manteo site. It is not pertinent to recommend studies to support this phase in this area.)	Physical Oceanography OSRA (p. 33)
	Physical Oceanography No Studies Required (p. 30)	Ecology *Sargassum* Community Dynamics (p. 55) Use of NC Shelf for Fish Reproduuction (p. 55) Seabird Survey (p. 56) Cetacean and Turtle Assessment (p. 56)
	Ecology No Studies Required (p. 46)	Socioeconomics Base Case Characterization (p. 66, a) Community Studies (p. 66, a) Aesthetic & Perceptual Issues (p. 66, a) Infrastructural Issues (p. 66, a) Socioeconomic Monitoring (p. 66, a & d)
	Socioeconomics No Studies Required (p. 60)	
Exploration/Delineation		
	Physical Oceanography (f) No Studies Required (p. 30)	Physical Oceanography OSRA Error Assessments (p. 33)
	Ecology Benthic Community Survey & Recovery (p. 48, c) Ecosystem Dynamics at the "Point" (p. 47, c) *Sargassum* Community Dynamics (p. 47, c)	Ecology No Studies Identified (p. 60)

PHASE	MANTEO SITE	NORTH CAROLINA OCS
	Socioeconomics Base Case Characterization (p. 63, b) Community Studies (p. 64, b) Aesthetic & Perceptual Issues (p. 64, b) Infrastructural Issues (p. 64, b) Socioeconomic Monitoring (p. 64, b & d)	Socioeconomics Base Case Characterization (p. 66, b) Community Studies (p. 66, b) Aesthetic & Perceptual Issues (p. 66, b) Infrastructural Issues (p. 66, b) Socioeconomic Monitoring (p. 66, b & d)
Development/Production		
	Physical Oceanography Shelf Circulation (p. 31)	Physical Oceanography Shelf Circulation/ Moorings (p. 34)
	Ecology Monitoring of *Sargassum* Community Contamination (p. 49, d) Oil on Cape Shoals (p. 49) Aggregations of Striped Bass (p. 49)	Ecology No Studies Identified (p. 57)
	Socioeconomics Base Characterization (p. 64, a) Community Studies (p. 64, a) Aesthetic & Perceptual Issues (p. 64, a) Infrastructural Issues (p. 64, a) Socioeconomic Monitoring (p. 64, a & d)	Socioeconomics Base Characterization (p. 66, a) Community Studies (p. 66, a) Aesthetic & Perceptual Issues (p. 66, a) Infrastructural Issues (p. 66, a) Socioeconomic Monitoring (p. 66, a & d)
Post-production (e)		
	Physical Oceanography No Studies Identified	Physical Oceanography No Studies Identified
	Ecology Sea Turtle Attraction Study (p. 50)	Ecology Sea Turtle Attraction Study (p. 57)

Socioeconomics Post-production study (p. 65)	Socioeconomics Post-production study (p. 66)
All Phases	General Geographic Information System (p. 66)

(a) Regional in scope
(b) Site-specific in scope
(c) Studies should be initiated immediately and should be completed before delineation is approved
(d) Monitoring design completed before identified phase but activity continued through post-production phase.
(e) Required before approval of production phase
(f) Although no specific new studies are recommended, further decision documents (p. 30).
analyses and interpretation of OSRA results are needed in the

[DOI Logo]

UNITED STATES DEPARTMENT
OF THE INTERIOR

MINERALS MANAGEMENT SERVICE
Atlantic OCS Region
381 Eden Street, Suite 1109
Herndon, Virginia 22070-4817

[Date Illegible]

Ms. Leslie J. Burton
Senior Counsel
Mobil Exploration & Producing U.S. Inc.
1250 Poydras Building
New Orleans, Louisiana 70113-1892

Dear Ms. Burton:

The Oil Pollution Act of 1990 contained provisions that prohibited the Minerals Management Service (MMS) from approving any application for permit to drill, approving any exploration plan, or permitting any drilling on lands offshore the State of North Carolina. Consequently, this office sent a letter to Mobil on September 21, 1990, directing a Suspension of Operations (SOO) on the 21 leases of the Manteo Unit.

The prohibitions in the Act were scheduled to expire on the later of the following:

a) October 1, 1991; or

b) 45 days of continuous session of Congress after submission of a written report to the Congress by the Secretary of the Interior, . . .

Secretary Lujan delivered the required report to the Congress on April 2, 1992. In the report, the Secretary certified that sufficient information currently exists for him to

exercise his responsibilities under the Outer Continental Shelf Lands Act and the National Environmental Protection Act regarding review and approval of exploration activities proposed offshore the State of North Carolina (the Manteo weil). The Secretary did not certify that these conditions exist for leases outside of the Manteo Unit. On June 7, 1992, the required 45 days of continuous session of Congress elapsed.

The circumstances that justified the granting of a SOO on the 21 leases of the Manteo Unit no longer exist. Therefore, effective June 8, 1992, the suspension of these 21 leases offshore the State of North Carolina is no longer in effect. Rental payments for your leases will be calculated from that date, unless another SOO is requested by the Unit Operator and approved by the MMS.

The terms of the leases covered by the previous suspension(s) will be extended for a period of time equal to the period the suspension(s) was (were) in effect (30 CFR 250.10 (f)). The 21 leases and the new expiration dates are as follows:

Lease	Date	Lease	Date
00225	6/7/94	00236	6/7/94
00226	6/7/94	00237	6/7/94
00227	6/7/94	00238	6/7/94
00228	6/7/94	00239	6/7/94
00229	6/7/94	00240	6/7/94
00230	6/7/94	00242	6/7/94
00231	6/7/94	00243	6/7/94
00232	6/7/94	00244	6/7/94
00233	6/7/94	00446	6/22/95
00234	6/7/94	00448	6/22/95
00235	6/7/94		

By copy of this letter, we are informing the other seven participants in the Manteo Unit of our decision.

Sincerely,

/s/ Bruce G. Weetman
BRUCE G. WEETMAN
Regional Director

cc: Amerada Hess Corporation
Chevron U.S.A. Inc.
Conoco Inc.
Marathon Oil Company
OXY USA Inc.
Shell Offshore Inc.
Union Oil Company of California
MMS Royalty Management
(Unit Agreement No. 752-290001-0)
(RMP Attn: Charles Ross, MS 3240)

MOBIL EXPLORATION & PRODUCING U.S. INC.

September 15, 1992

Mr. Bruce Weetman
Regional Director
Minerals Management Services
Atlantic OCS Region
381 Elden Street, Suite 1109
Herndon, Virginia 22070-4817

Dear Bruce:

I am in receipt of your letter dated September 2, 1992 about the suspension of operations serving the 21 leases of the Manteo Unit.

Mobil Exploration & Producing U.S. Inc., as agent for Mobil Oil Exploration & Producing Southeast Inc. (Mobil) and operator of the Manteo Unit, hereby requests that a Suspension of Operations (SOO) be in full force and effect from June 8, 1992 forward pursuant to § 250.10(6) Title 30 of the Code of Federal Regulations.

I understand from your letter that the reason for retroactively terminating the original SOO was the expiration for the running of a continuous session of Congress, under the terms of Section 6003 of the Oil Pollution Act of 1990 (OPA). At the same time that certain mandates of the OPA have been fulfilled, the Manteo Unit partners are still awaiting a decision from the U.S. Department of Commerce on appeals from the State of North Carolina's Denials of Consistency Certification on the Exploration Plan and the NPDES Permit. These appeals were filed respectively, in July 1990 and December 1990. The appellets record was reopened as recently as April 29, 1992 to admit the Environmental Science Review Panel report.

Supplemental briefs were submitted to Commerce at the end of May, 1992.

Due to the indeterminate administrative delay that has been evidenced over the past period of years and continues at present, Mobil hereby requests that the SOO be continued or reinstated pursuant to 30 CFR § 250.10(6) effective as of the necessary date specified by your letter, June 8, 1992.

Very truly yours,

/s/ Leslie J. Burton
LESLIE J. BURTON

LJB/rt/bw

cc: Manteo Partners
Craig Wyman

3322.LJB

MOBIL EXPLORATION & PRODUCING U.S. INC.

September 23,1992

VIA FEDERAL EXPRESS

Mr. Bruce G. Weetman
Regional Director
Minerals Management Service
Atlantic OCS Region
381 Elden St., Suite 1109
Herndon, Virginia 22070-4817

Dear Bruce:

Upon further review of your letter dated September 9, 1992 I wish to call your attention to further reasons for reinstating the Suspension of Operation (SOO) on the Manteo Unit. The Manteo partners are awaiting decisions on appeals from the State of North Carolina's Denials of Consistency Certification, as discussed in my letter dated September 15, 1992. In addition, we are also prevented from proceeding with an exploration well due to the requirement issued in the April 6, 1992 Report to Congress by Secretary Lujan pursuant to his responsibilities under the Oil Pollution Act of 1990 that he ". . . will not issue a permit, approve the exploration plan, or allow any drilling until the studies have been completed." We understand that the studies which the Secretary has stated as necessary will take approximately twelve months to complete. Since these studies are being conducted pursuant to the Oil Pollution Act of 1990, we continue to be precluded by that Act from exploration activity.

Thus, the same conditions that justified the original SOO continue to exist and that SOO should accordingly be reinstated. That being the case and for the same reasons that rentals were not required under the original SOO,

rental payments would not be due as we continue to be prevented from drilling. Please respond as soon as possible to this request.

Very truly yours,

/s/ Leslie J. Burton
LESLIE J. BURTON

LJB:bw

605.LJB
cc: All Manteo Partners

[DOI Logo]

UNITED STATES DEPARTMENT
OF THE INTERIOR

MINERALS MANAGEMENT SERVICE
Atlantic OCS Region
381 Elden Street, Suite 1109
Herndon, Virginia 22070-4817

Oct. 9, 1992

Ms. Leslie J. Burton
Senior Counsel
Mobil Exploration & Producing U.S. Inc.
1250 Poydras Plaza
New Orleans, LA 70113-1892

Dear Ms. Burton:

We have received your letters dated, September 15, and 23, 1992 requesting a suspension of operations (SOO) covering the 21 leases of the Manteo Unit.

Your letter of September 15, 1992 cited as your reason for requesting a SOO pursuant to 30 C.F.R. § 250.10 (b)(6) "the indeterminate administrative delay" facing the Manteo Unit partners who are "still awaiting a decision from the U.S. Department of Commerce on appeals from the State of North Carolina's Denials of Consistency Certification on the Exploration Plan and the NPDES Permit."

Your September 23, 1992 letter adds as a further reason for requesting the SOO the two studies which the Environmental Sciences Review Panel recommended. In addition, you suggest that the Minerals Management Service (MMS) should not require the payment of rentals.

On July 12, 1989, Mobil Oil Corporation (Mobil) (as a lessee of OCS leases offshore North Carolina and as probable unit operator of the anticipated Manteo Unit) entered into a Memorandum of Understanding (MOU) with the State of North Carolina and the MMS. Part II, paragraph 13 of the MOU reflected the agreement reached by the three parties as follows:

> If the State objects to Mobil's certification of consistency, or if any other administrative or judicial challenges or appeals arise, or if the issuance of the permits for Mobil's exploration activities is delayed due to any of the other circumstances contemplated by 30 C.F.R. § 250.10, upon Mobil's application, issue additional suspensions of operations, pursuant to 30 C.F.R. § 250.10, to allow for the resolution of such matters and to allow Mobil two drilling seasons under the EP thereafter. For the purpose of this paragraph, a drilling season is the period of May 1 through October 31.

Consistent with that agreement and pursuant to Mobil's requests for a SOO, and as authorized by the regulations at 30 C.F.R. § 250.10(b)(4) and (6), the MMS hereby issues a SOO for the 21 leases of the Manteo Unit. The effective date of the SOO is June 8, 1992. In accord with your request, the SOO will expire when the two studies have been accepted by MMS and when the U.S. Department of Commerce renders a decision on the appeals from the State of North Carolina's Denials of Consistency Certification on the Exploration Plan and the NPDES Permit.

The terms of the leases covered by this suspension will be extended for a period of time equal to the period the suspension is in effect. 30 C.F.R. § 250.10(f). No payment of rental is required during the period of the sus-

pension until MMS accepts the two studies. 30 C.F.R. § 218.154(a) and 30 C.F.R. § 218.154(b)(2).

The 21 leases affected by this SOO are as follows:

Lease	Block	Lease	Block
00225	246	00236	467
00226	247	00237	510
00227	290	00238	511
00228	291	00239	553
00229	334	00240	554
00230	335	00242	597
00231	378	00243	598
00232	379	00244	640
00233	422	00446	555
00234	423	00448	641
00235	466		

By copy of this letter, we are informing the other seven participants in the Manteo Unit of our decision.

Sincerely,

/s/ Bruce G. Weetman
BRUCE G. WEETMAN
Regional Director

cc: MMS Royalty Management
(Unit Agreement No. 752-290001-0)
(RMP Attn: Charles Ross, MS 3240)
Amerada Hess Corporation, Chevron U.S.A. Inc., Conoco Inc., Marathon Oil Company, OXY USA Inc., Shell Offshore Inc., Union Oil Company of California

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 92-331C
(Judge Robinson)

CONOCO INC., *et al.*,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

DEFENDANT'S RESPONSE TO THIRD PARTY PLAINTIFFS' THIRD SET OF REQUESTS TO ADMIT INTERROGATORIES

Defendant submits the following response to "third party plaintiffs' " third set of requests to admit and interrogatories.

Definitions

Definition No. 2(a)

Defendant objects to definition number 2(a) to the extent that it seeks information protected by the Privacy Act, 5 U.S.C. § 552a.

Definition No. 2(b)-(c).

Defendant objects to definition numbers 2(b)-(c) as overly broad and unduly burdensome.

Definition No. 3.

Defendant objects to definition number 3 to the extent that it seeks to require a search of the materials of every

agency of the Government as overly broad and unduly burdensome.

REQUEST TO ADMIT NO. 24

Admit that no PLAN OF EXPLORATION submitted to the United States Department of the Interior with respect to an OCS LEASE has ever been disapproved based upon the determinations set forth in 43 U.S.C. § 1340 (c)(1)(A) and (B).

RESPONSE:

Admits.

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 92-331-C

CONOCO INC.,
Plaintiff,

AMERADA HESS CORPORATION, *et al.*,
Third-Party Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

DEPOSITION OF DAVID COURTLAND O'NEAL

Phoenix, Arizona

August 31, 1993

* * * *

[2] DEPOSITION OF DAVID COURTLAND O'NEAL was taken on August 31, 1993, commencing at 8:12 a.m., at the law offices of Meyer, Hendricks, Victor, Osborn & Maledon, P.A., 2929 North Central Avenue, Suite 2100, Phoenix, Arizona, before CHRISTINA L. LARSEN, a Notary Public in and for the County of Maricopa, State of Arizona.

The plaintiff was represented by its attorneys, Vinson & Elkins, by Mr. W. Dalton Tomlin.

The third-party plaintiffs were represented by their attorneys, Covington & Burling, by Mr. E. Edward Bruce.

The defendant was represented by its attorneys, the Department of Justice, by Mr. Mark A. Melnick and Ms. Nadira Clarke.

* * * *

[6] DAVID COURTLAND O'NEAL,

a witness herein, having been first duly sworn by the Notary Public to speak the truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. BRUCE:

Q. Mr. O'Neal, for the record, would you state your full name, please?

A. David Courtland O'Neal.

Q. And where do you presently reside?

A. I reside in Scottsdale, Arizona.

Q. Are you presently employed? Do you have a professional affiliation here in Arizona?

A. I do not. I have O'Neal Consulting Company.

Q. That's here in Arizona?

A. Yes.

Q. And that's your present employment?

A. Right.

MR. BRUCE: Mr. O'Neal, for the record, I'm going to ask this be marked Exhibit No. 23.

(Deposition Exhibit No. 23 was marked for identification.)

* * * *

[10] Q. And in what capacity did you serve at the Interior Department when you returned in 1989?

A. I went back to Interior as the Assistant Secretary of Interior for Lands and Minerals.

Q. If you would, sir, just describe in a general way your responsibilities as Assistant Secretary. Perhaps it would be easier for you to describe the departments or sections that you supervised in that capacity.

A. There were three bureaus under the Assistant Secretary for Lands and Minerals. One was the Bureau of

Land Management. One was the Office of Surface Mining. And the other was Minerals Management Service.

* * * *

[64] Q. And that's what this ER was, in your understanding?

A. Yes.

Q. And you were advised, you believe, that this was the most extensive ER done for any one well ever in connection with the OCS program; is that correct?

A. That's what I was told by the career professionals at the Minerals Management Service.

Q. And you acted on their professional advice?

A. Uh-huh.

Q. Would you say yes, sir?

A. Yes.

MR. BRUCE: Let the record show he said "uh-huh," and I wanted to make it clear what he said.

Q. BY MR. BRUCE: So the Interior Department was informing the Commerce Department in an official way that this Mobil proposal had received the most extensive and intensive [65] environmental examination that had ever been afforded an exploration well in the OCS program?

A. That's correct.

Q. Similarly, the Interior Department was informing the Commerce Department that there would be no significant impacts offshore for any resource and no significant impacts that would affect the State coastal zone; is that correct?

A. That's correct.

Q. And you were acting, again, on the professional advice of people at MMS in making this report to Mr. Castle; is that right?

A. That's correct.

Q. And you believed it to be true?

A. Yes, I do.

Q. Had these professionals ever misled you in the past on issues of this sort?

A. No, they hadn't.

* * * *

[83] Q. Now, did the piece of legislation—of course, at this point on August 1, it was a proposal the Secretary is expressing the Department's opposition to—did this piece of legislation ultimately get enacted?

A. My understanding is it did.

Q. As part of the—as a section of the—

A. As a section of the conference on the Oil Pollution Liability and Compensation Act.

Q. Was this something that came to be known as the Outer Banks Protection Act, this proposal that the Secretary is criticizing here?

A. I don't know. I don't know what it was called. It was, in fact, the Oil Pollution Liability and Compensation Act. I don't know if it was called the Outer Banks. I didn't refer to it that way.

Q. Is your understanding consistent with that recited by the Secretary that the administration strongly opposed the delay of exploratory activity off of North Carolina that would come about as a result of Section 6003 as proposed?

A. Yes, we did strongly oppose it.

[84] Q. Why did you oppose it, sir? Why did the Department oppose it?

A. Well, again, it kept us from carrying out our responsibilities under the OCS Lands Act, and it also was done in a manner that I believe was offensive to the administration in that they didn't have any hearings on it or anything else. Just in conference committee, they, Walter, inserted that amendment.

Q. By Walter, you mean—

A. Walter Jones, the Representative from North Carolina.

Q. So you were not called upon to provide or given an opportunity to provide any evidence as to the necessity or desirability of Section 6003; is that correct?

A. That's correct.

Q. Do you know whether Congressional hearings were held on other parts of this more comprehensive Oil Spill Act of 1990?

A. I believe the hearings were held as usual, but I think this was done in conference without the—without going through the hearing process in either house.

Q. Were you aware of any shortcomings, [85] insufficiencies, gaps, or the like, in the environmental information to proceed with exploration offshore North Carolina that would justify Section 6003?

A. No, I'm not aware of any. If there had been, they would have used that, not snuck it in.

Q. When you say they would have used such a lapse or gaps instead of sneaking it in, who is the "they" you're talking about, sir?

A. Well, Walter Jones, the Representative from North Carolina, knew the issues well enough, had control of his committee well enough, that if there had been a flaw and he was opposed, he would have used that flaw and had hearings and all the trappings to make it that kind of a part of the record, rather than waiting and cutting his own deal without going through any hearings.

Q. Did this Section 6003 suffer from, in your judgment, suffer from the same deficiencies that you have previously described with respect to the Florida and Alaska appropriations moratoria?

MR. MELNICK: Objection. The question is ambiguous.

Q. BY MR. BRUCE: If you understand the question, you can answer it. If you don't, I can [86] rephrase it.

A. Yeah, I understand the question. All three were basically the same reasons.

Q. So you put this North Carolina restriction into the same category as you put the Alaska and Florida restrictions; is that correct?

A. Yes, I do.

Q. They are like Alaska and Florida. There is no scientific basis for this restriction; is that right?

A. That is correct.

Q. Like Florida and Alaska, they are inconsistent with the OCS Lands Act and the National Environmental Policy Act; is that correct?

MR. MELNICK: Objection. Calls for a legal conclusion.

MR. BRUCE: You can answer the question, sir.

A. BY THE WITNESS: That is correct, in my estimation.

Q. BY MR. BRUCE: You would refer to this as being arbitrary the way you referred to the appropriations moratoria; is that correct?

A. I do.

[87] Q. By "this," of course, I mean Section 6003. Do you reaffirm your answer?

A. Yes, I do.

Okay. And in the same way that this too would be an act of bad faith on the part of the Federal Government?

A. That's correct.

Q. And this too, Section 6003, would be inconsistent with the terms of the leases that were issued for North Carolina?

MR. MELNICK: Objection. Calls for a legal conclusion?

A. BY THE WITNESS: In my opinion.

Q. BY MR. BRUCE: In your opinion what, sir? Yes or no?

A. Yes.

Q. In your opinion, it would be inconsistent with the terms of the leases?

A. Yes, it would be.

MR. BRUCE: Thank you. I could have brought the Costlow deposition exhibit but I forgot to. We will just have to mark it again. This will be 41.

(Deposition Exhibit No. 41 was marked for identification.)

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

(Caption Omitted in Printing)

DEPOSITION OF BRUCE G. WEETMAN

Washington, D.C.

Tuesday, February 15, 1994

* * * *

[115] **EXAMINATION**

BY MR. TAURMAN:

Q Mr. Weetman, were you aware of the Outer Banks Protection Act before it was enacted in August of 1990?

A No, I wasn't.

Q Do you know how the Outer Banks Protection Act became a part of the Oil Pollution Act of 1990?

A I don't understand what you're driving at.

Q Were you aware that Congressman Jones or North Carolina was the chairman of the conference committee on the Oil Pollution Act?

A Was I aware that he was the chairman?

Q Of the conference committee in Congress that was considering the Oil Pollution Act in July and August of [116] 1990.

A I don't remember him being—whether he was the chairman of that. I know he was a committee chairman. I was not aware he was conference chairman.

Q Were you aware in 1990 that Congressman Jones of North Carolina was seeking an appropriations moratorium on exploration of offshore North Carolina OCS?

A Yes.

Q Were you aware that he was unsuccessful in getting an appropriations moratorium?

A Yes.

Q And are you aware that shortly thereafter, he was able, as chairman of the conference committee, to put his Outer Banks Protection Act provisions into the Oil Pollution Act of 1990?

A Was I aware of it?

Q Yes.

A After it came out in the Act, yes.

* * * *

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

(Caption Omitted in Printing)

DECLARATION OF MARGO E. JACKSON

1. I, MARGO E. JACKSON, have been employed as Assistant General Counsel in the Office of General Counsel, at the National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce, since October 1989.

8. I am familiar with the regulations and requirements of the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1451 *et seq.*, as amended.

3. I am the supervisor of the Office of the Assistant General Counsel for Ocean Services of NOAA General Counsel which is handling two appeals submitted by Mobil Oil Exploration & Producing Southeast, Inc. (Mobil), from objections of the State of North Carolina to Mobil's proposed exploration of Manteo Area Block 467. On July 31, 1990, and on December 3, 1990, pursuant to CZMA § 307(c)(3)(A) and (B), 16 U.S.C. § 1456(c)(3)(A) and (B), Mobil requested the Secretary of Commerce to override North Carolina's objections to Mobil's proposed drilling discharge activities and a proposed exploration plan for Manteo Area Block 467 (Mobil-Manteo CZMA appeals).

4. I am the supervisor with primary responsibility for handling these two appeals filed by Mobil.

5. I am aware of the enactment of the Oil Pollution Act of 1990 (OPA), and § 6003 of the OPA which included

the Outer Banks Protection Act (OBPA), which established the Environmental Sciences Review Panel (ESRP). Pub. L. No. 101-380, § 6003, 104 Stat. 484, 555 (1990).

6. I am aware that as a result of this legislation, the Secretary of the Interior required that certain studies be completed.

7. On April 29, 1992, because the consistency appeal decision had not yet been reached, the report of the ESRP was admitted into the administrative records of the two Mobil-Manteo CZMA appeals.

8. I am aware of no circumstances whereby the Secretary of Commerce's decisions on the two Mobil-Manteo CZMA appeals have been suspended, impeded, or otherwise delayed by enactment or implementation of the OPA, OBPA, or activities of the ESRP, or made contingent upon the completion of any of the studies required by their enactment.

9. I was also the supervisor with primary responsibility for handling two separate appeals submitted by Union Oil Company of California (Unocal) and Mobil Oil Exploration & Production U.S. Inc. (MEPUS), (as agent for Mobil Exploration & Production North America Inc. (MEPNA)), from objections of the State of Florida to Unocal's proposed exploration of Blocks 629 and 630 and Mobil's proposed exploration of Block 799.

10. I am aware that on December 21, 1988, pursuant to CZMA § 307(c)(3)(B), 16 U.S.C. § 1456(c)(3)(B), Unocal requested the Secretary of Commerce to override Florida's objections to its proposed exploration plan for Blocks 629 and 630.

11. I am aware that in January 1989, pursuant to CZMA § 307(c)(3)(B), 16 U.S.C. § 1456(c)(3)(B), Mobil also requested the Secretary of Commerce to override

Florida's objections to its proposed exploration plan for Block 799.

12. I am aware that in 1989 the President of the United States George W. Bush established the Outer Continental Shelf Leasing & Development Task Force ("Task Force") "to review and resolve environmental concerns" about three OCS oil and gas lease sales off Florida and California, scheduled for fiscal year 1990.

13. I am aware that in the 1989 and 1990 Department of the Interior Appropriation Acts, Congress prohibited the Department of the Interior from leasing and approving or permitting any exploratory drilling in the eastern Gulf of Mexico in the areas south of 26 degrees North latitude and east of 86 West longitude so that additional enivronmental information could be collected.

14. I am aware that in the 1991, 1992, 1993 and 1994 Department of the Interior Appropriations Acts (Interior Appropriations Acts), Congress restricted the Department of the Interior from using any of its funds "for the conduct of offshore leasing and related activities placed under restriction in the President's moratorium statement of June 26, 1990, in the areas . . . the Eastern Gulf of Mexico south of 26 degrees north latitude . . ."

15. I am aware that pursuant to a November 1989 agreement between Unocal, Mobil and the State of Florida, the final briefing schedule on the two CZMA appeals would be established after the Task Force report was completed, but no later than January 1990, and if the report was not complete, the issue of a final briefing schedule would be discussed at that time.

16. I am aware that on April 6, 1990, the Secretary determined that in order to facilitate an efficient decision on the two CZMA appeals and because it was unknown

when the Task Force report would be available for the Secretary's review, a final briefing schedule was established.

17. I am aware of the June 26, 1990 statement of President of the United States George W. Bush in which he asked the Secretary of the Interior "to begin a process that may lead to the buyback and cancellation" of the 73 leases offshore Florida which were affected by his decision, which includes the leases at issue in the Unocal and Mobil CZMA appeals.

18. I am aware that in September 1990, after the Department of Commerce had considered what, if any, effect the President's decision would have on the leases at issue in the two CZMA appeals, and that because there was no agreement between the parties as to those issues, the Secretary decided to proceed in his determinations on the two CZMA appeals.

19. I am aware of no other circumstances whereby the Secretary of Commerce's decisions on the Unocal and Mobil CZMA appeals have been suspended, impeded, or otherwise delayed by enactment or implementation of the 1989, 1990, 1991, 1992, 1993 and 1994 Interior Appropriation Acts, the President's June 26, 1990 decision, or by any other actions.

20. Furthermore, I have read the *First Amended Complaint* of Third Party Plaintiffs Amoco Production Company (No. 52), Union Oil Company of California (No. 47), Texaco Exploration and Production Inc. (No. 48), Chevron U.S.A., Inc. (No. 55), Mobil Exploration & Producing North America Inc. (No. 48), Shell Offshore Inc. (No. 56), and OXY USA Inc. (No. 53), where they state that "The extraordinary delay by the Secretary of Commerce in deciding the CZMA appeal is a direct result of the congressional appropriations moratoria and the

President's June 1990 decision" and these statements are wholly erroneous and contrary to the facts of this record. As I stated above, the final issuance of the Secretary's decisions was delayed by less than three months, the period of time between the announcement of the President's decision on June 26, 1990 and the Secretary's decision in September 10, 1990 to proceed to a decision in the two CZMA appeals.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the above statements are true and correct. Executed this 6 day of April, 1994.

/s/ Margo E. Jackson

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

(Caption Omitted in Printing)

DECLARATION OF PAUL MARTIN

1. I, PAUL MARTIN, was employed as Regional Supervisor for Field Operations in the Atlantic Region Office of the Outer Continental Shelf (OCS) of the Minerals Management Service (MMS), U.S. Department of the Interior, from February 1981 until February 1985, and as Chief of the Offshore Resource Evaluation Division in MMS, since February 1985.

2. I am familiar with the regulations and requirements of the Outer Continental Shelf Lands Act (OCSLA), as amended, 43 U.S.C. §§ 1301 *et seq.* (1990).

3. As Regional Supervisor, I was responsible for supervising the approval and management of Exploration Plans (EP) submitted by companies to conduct exploratory drilling activities in the offshore areas of the Atlantic OCS Region.

4. I am aware that on April 26, 1982, an EP was submitted by Chevron U.S.A., Inc. (Chevron), as a partner with Conoco, Inc., Shell Oil Company (now Shell Offshore Inc.), and Cities Service Company, (now Oxy USA Inc.), for Lease No. OCS-A 00237, comprising block 510, OPD NI 18-2, offshore North Carolina.

5. I am aware that on July 9, 1982, MMS approved Chevron's EP for Block 510, OPD NI 18-2.

6. I am aware that on July 19, 1982, Chevron submitted an Application for Permit to Drill (AFD) an exploratory well on Lease No. OCS-A 00237, Block 510, OPD NI 18-2.

7. I am aware that since Chevron has not fulfilled all of the requirements incumbent on an applicant before an APD can be considered for approval, such as positioning of oil spill containment equipment in the vicinity of the drill site, MMS has taken no final action on the Chevron APD.

8. I am aware of no additional action taken by Chevron or its partners to pursue drilling an exploratory well on Lease No. OCS-A 00237, Block 510, OPD NI 18-2.

9. I am aware that on May 17, 1982, an EP was submitted by Arco Exploration Company (Arco), as a partner with Murphy Oil Company (new Murphy Exploration & Production Company) and Odeco Oil & Gas Company, for Lease Nos. OCS-A 00247 and OCS-A 00248, comprising Blocks 709 and 710, OPD NI 18-5, Offshore North Carolina.

10. I am aware that on October 27, 1982, MMS approved Arco's EP for Lease Nos. OCS-A 00247 and OCS-A 00248, Blocks 709 and 710, OPD NI 18-5.

11. I am aware of no other actions taken by Arco or its successors in interest, Murphy Exploration & Production Company or Murphy Oil U.S.A., Inc., to pursue drilling an exploratory well on Lease Nos. OCS-A 00247 and OCS-A 00248, Blocks 709 or 710, OPD NI 18-5.

12. I am aware that on August 20, 1990, an EP was submitted by Mobil Exploration & Producing Southeast, Inc. (Mobil), as Unit Operator of the Manteo Unit, for Lease No. OCS-A 00236, Block 467, OPD NI 18-2, offshore North Carolina.

13. Iam aware of no other EPs which have been submitted for leases in the Atlantic OCS Region which are a subject of this litigation.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the above statements are true and correct. Executed this 8th day of April, 1994.

/s/ Paul E. Martin

[DOI Logo]

UNITED STATES DEPARTMENT OF
THE INTERIOR

MINERALS MANAGEMENT SERVICE
Washington, DC 20240

Jul. 22, 1994

Ms. Dianna Josephson
Deputy Under Secretary for
Oceans and Atmosphere
U.S. Department of Commerce
14th St. and Constitution Ave., N.W.
Room 5810
Washington, D.C. 20230

Dear Ms. Josephson:

Enclosed for your information and submitted for inclusion in the record are the following studies relevant to the appeal of North Carolina's objection to consistency certification for Mobil Oil Exploration and Producing Southeast, Inc.'s exploration plan for Manteo Block 467:

Benthic Study of the Continental Slope off Cape Hatteras North Carolina; and

Coastal North Carolina Socioeconomic Study.

These two studies were undertaken as a result of a recommendation of the North Carolina Environmental Sciences Review Panel. My office has recently completed its review of these studies.

If you have any questions concerning them, please let us know.

Sincerely,

/s/ Thomas Gernhofer
THOMAS GERNHOFER
Associate Director for
Offshore Minerals Management

Enclosures (2)

cc: Governor of North Carolina
Manager, Environmental Regulations and
Loss Prevention, Mobil Exploration
and Production—U.S.

DECISION AND FINDINGS

IN THE

PLAN OF EXPLORATION

CONSISTENCY APPEAL OF

MOBIL OIL EXPLORATION &

PRODUCING SOUTHEAST, INC.

FROM AN OBJECTION BY THE

STATE OF NORTH CAROLINA

SEPTEMBER 2, 1994

DECISION

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EXECUTIVE SUMMARY

Introduction

Mobil Oil Exploration & Producing Southeast, Inc. (Mobil) has requested the Secretary of Commerce to override the State of North Carolina's (State's) objection to Mobil's proposed Plan of Exploration (POE) of the outer continental shelf (OCS) offshore North Carolina. Mobil proposes to drill an exploratory well in OCS Manteo Area Block 467 in order to evaluate its hydrocarbon potential. As explained in more detail below, the Secretary declines to override North Carolina's objection.

Mobil has also filed a separate appeal from the State's prior objection to its proposed discharge activities at the drill site. A Secretarial decision in that appeal is being issued concurrently with the decision in this appeal. In that companion decision, the Secretary also declines to override North Carolina's objection to Mobil's proposed drilling discharges at the drill site. Accordingly, North Carolina's objection under the CZMA prevents any Federal agency from granting necessary permits or licenses for Mobil's proposed discharge of drilling wastes or Mobil's proposed Plan of Exploration.

Mobil's appeal arises under the Coastal Zone Management Act (CZMA), an act administered by the National Oceanic and Atmospheric Administration (NOAA), an agency within the Department of Commerce. Section 307 of the CZMA provides that persons submitting an OCS POE to the Secretary of the Interior which affects any land or water use or natural resource of the coastal zone, shall certify that activities described in detail in the POE are consistent with the enforceable policies of a state's coastal management program.

Mobil has submitted its POE for Manteo Area block 467 to the Minerals Management Service of the Department of the Interior. Because North Carolina has objected to the project, Federal agencies may not issue any permit or license necessary for Mobil's POE to proceed, unless the Secretary of Commerce finds that the activity is consistent with the objectives of the CZMA or is otherwise necessary in the interest of national security.

Background

About 39 miles off North Carolina's coast lies OCS Lease A-0236, also known as Manteo Area Block 467, for which Mobil is the operator. Mobil proposes to drill one exploratory well in search of natural gas at this site and conduct support activities primarily out of Morehead City, North Carolina. Mobil's proposed drilling site is located near "the Point," a biologically unique area defined by the convergence of the Gulf Stream, slope, and shelf waters, containing significant natural resources. Moreover, fish resources found near The Point are harvested by North Carolina fishermen. Mobil submitted its proposed POE for Manteo Area Block 467 to the Minerals Management Service of the Department of the Interior (DOI), and certified that the activities described in detail in the POE were consistent with North Carolina's coastal management program.

On November 19, 1980, the State objected to Mobil's proposed POE on the basis of a lack of necessary site-specific data and information. *See* 15 C.F.R. § 930.64(d). Specifically, the State contends that there is insufficient information to make a consistency determination on the impacts arising from Mobil's activity. The State identified informational concerns relating to coastal resources and uses potentially affected by Mobil's proposed activity.

Under § 307(c)(3)(B) of the Coastal Zone Management Act, as amended (CZMA), 16 U.S.C. § 1456(C)(3)(B), and the implementing regulations, the State's consistency objection precludes Federal agencies from issuing any permit or license necessary for Mobil's proposed activity to proceed, unless the Secretary of Commerce (Secretary) finds that each activity described in detail in Mobil's POE is either consistent with the objectives or purposes of the CZMA (Ground I), or otherwise necessary in the interests of national security (Ground II).

In accordance with CZMA § 307(c)(3)(B) and 15 C.F.R. Part 930, Subpart H, Mobil filed with the Secretary an appeal from the State's objection to Mobil's consistency certification for the proposed POE. Mobil appealed pursuant to Ground I and Ground II. Additionally, three threshold issues were raised during the course of the appeal.

Threshold Issues

Upon consideration of the information submitted by Mobil, the State, the public, and several Federal agencies, the Secretary made the following findings on the threshold issues:

A. *Compliance with the CZMA and Its Regulations*

Mobil contended that the State failed to properly follow the statutory and regulatory requirements for formulation of a consistency objection on the grounds of insufficient information and that therefore the State's objection is defective. Upon examination of the record of this appeal, the Secretary found that the State had complied with the CZMA and its implementing regulations in objecting to Mobil's proposed POE.

B. *Request for a Dismissal*

The State requested that the Secretary dismiss Mobil's Ground I claims for good cause, arguing that Mobil failed to provide data and information necessary to the Ground I test. The Secretary declined to dismiss Mobil's Ground I claims for good cause. The Secretary found that in this case if there is insufficient data and information in the record to make the findings necessary for an override, rather than dismiss part of the appeal as the State has requested, the Secretary will issue a decision which will reflect an inability to make these findings.

C. *Adequacy of Information*

The parties raised an issue as to the adequacy of information. The State argued that Mobil has failed to provide adequate information to assess the impacts of its proposed activity, let alone prove that the grounds for an override have been met. Mobil asserted that there is adequate information on the effects of the proposed POE, and that any effects are minor. The Secretary found that in examining the information in the record of the appeal, the Secretary will necessarily determine the adequacy of information.

D. *Conclusions Regarding Threshold Issues*

The Secretary determined that threshold issues raised by Mobil and the State of North Carolina did not preclude him from considering the merits of this case.

Ground I: Consistent with the Objectives or Purposes of the CZMA

To find that the proposed activity satisfies Ground I, the Secretary must determine that the project satisfies all four

of the elements specified in the regulations implementing the CZMA (15 C.F.R. § 930.121). If the project fails to satisfy any one of the four elements, it is not consistent with the objectives or purposes of the CZMA and federal licenses or permits may not be granted. The four elements of Ground I are:

1. The proposed activity promotes one or more of the competing national objectives or purposes contained in the CZMA.

2. The proposed activity's individual and cumulative adverse effects on the coastal zone are outweighed by its contribution to the national interest.

3. The proposed activity will not violate any requirements of the Clean Water Act or the Clean Air Act.

4. There is no reasonable alternative available that would allow Mobil to explore Manteo Area Block 467 in a manner consistent with the State's coastal management program.

The Secretary made the following findings with regard to Ground I:

1. Mobil's proposed POE furthers one or more of the objectives or purposes of the CZMA because the CZMA recognizes a national objective in achieving a greater degree of energy self-sufficiency. Mobil's exploration for offshore gas resources serves the objective of energy self-sufficiency.

2. The information in the record is inadequate to determine whether the national interest benefits of Mobil's proposed POE outweigh the proposed activity's adverse effects on the State's coastal resources and uses.

3. Mobil's proposed POE will not violate the Clean Air Act, as amended, or the Federal Water Pollution Control Act, as amended.

4. There is no reasonable alternative available to Mobil that would allow its proposed POE to be carried out in a manner consistent with the State's coastal management program.

Ground II: Necessary in the Interest of National Security

There will be no significant impairment to a national defense or other national security interest if Mobil's proposed POE is not allowed to go forward as proposed.

Conclusion

Because Mobil's proposed POE does not meet the requirements of either Ground I or Ground II, the activity may not proceed as proposed.

LIST OF ABBREVIATIONS AND DEFINED TERMS

CAA—Clean Air Act
CMP—Coastal Management Program
COE—Corps of Engineers
CSA—Continental Shelf Associates, Inc.
CWA—Clean Water Act
CZMA—Coastal Zone Management Act
DEM—Division of Environmental Management
DER—Draft Environmental Report
DOD—Department of Defense
EA—Environmental Assessment
EPA—Environmental Protection Agency
ESRP—Environmental Sciences Review Panel
DOE—Department of Energy
DOI—Department of the Interior
FER Final Environment Report
FWS—Fish and Wildlife Service
MMS—Minerals Management Service
MOEPSI—Mobil Exploration & Producing Southeast, Inc.
NAAQS—National Ambient Air Quality Standards
NCDMF—North Carolina Division of Marine Fisheries
NMFS—National Marine Fisheries Service
NOAA—National Oceanic and Atmospheric Administration
NPDES—National Pollutant Discharge Elimination System
NRC—National Research Council
NSC—National Security Council
OCRM—Office of Ocean and Coastal Resource Management
OCS—Outer Continental Shelf
OOC—Offshore Operators Committee
POE—Plan of Exploration
SAFMC—South Atlantic Fishery Management Council
State—State of North Carolina

DECISION

I. FACTUAL BACKGROUND

In Federal waters, about 39 miles off North Carolina's coast, lies Outer Continental Shelf (OCS) Lease OCS A-0236, also known as Manteo Area Block 467. *See* Figure 1. This area was leased in September 1981 by Mobil [1] and its partners [2] in OCS Lease Sale 56. Mobil is the operator of the lease. Mobil's Statement in Support of a Secretarial Override (Mobil's Initial Brief), at 2. The lease block lies at the crest of a buried reef complex which runs in a general north-south direction along the edge of the Mid-Atlantic OCS.[3] Mobil's Initial Brief at 13.

The activity at issue in this case is Mobil's proposed one-well Plan of Exploration (POE) of Manteo Area Block

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1 Mobil Oil Exploration & Producing Southeast, Inc., a subsidiary of Mobil Exploration & Producing U.S. Inc., is the proposed operator. For the purposes of description in this decision, both entities will be referred to as "Mobil."

2 The administrtaive record for this appeal indicates that Mobil's partners in the Manteo Area Block 467 project are the Martharon Oil Company and the Amerada Hess Corporation. *See* Manteo Unit Operating Agreement, Exhibit B.

3 The Minerals Management Service (MMS) estimates that there is a 90 percent chance that no hydrocarbons will be discovered in the area of which Block 467 is a part. If a discovery is made, however, the discovery is likely to be gas rather than oil, based on geochemical analyses of previous wells drilled on the Atlantic OCS. Final Environmental Report on Proposed Exploratory Drilling Offshore North Carolina, MMS, August 1990, (FER), at III-5. The potential size of a discovery could be more than five trillion cubic feet of natural gas. Letter from David C. O'Neal, Assistant Secretary, Land and Minerals Management, Department of the Interior, to Gray Castle, Deputy Under Secretary for Oceans and Atmosphere, Department of Commerce, June 4, 1991. If such a discovery is made, the MMS estimates that approximately 103 wells would be required to recover this amount of gas. FER at IV-13.

467. On August 20, 1990, Mobil submitted its POE for Manteo Area Block 467 to the Minerals Management Service of the Department of the Interior (DOI), and certified that the activities described in detail in the POE were consistent with North Carolina's Coastal Management Program (CMP). Mobil proposes to drill one exploratory well in a water depth of 2,690 feet and estimates the drilling schedule to be approximately 114 days, sometime between May and October. *See* Mobil's Initial Brief at 14. Mobil will support the drilling operation with a facility in Morehead City, North Carolina.

[Figure 1 Map Omitted in Printing]

Mobil's Initial Brief at 15. The proposed drilling site is located, however, near an area known as "The Point."

The Point is an area characterized by unique physical and biological qualities. Physically, The Point is a mobile, transitional ocean area defined by the convergence of the Gulf Stream, continental slope, and shelf waters. The Point is not a fixed location, rather its position fluctuates with changes in the location of the western boundary of the Gulf Stream. Water mass convergences at The Point concentrate nutrients, plankton and floating materials near the sea surface, resulting in weedlines. Biologically, The Point is a highly productive and ecologically unique area essential to the State's coastal zone. Fish resources found near The Point such as yellowfin, bluefin, blackfin, and bigeye tuna, white and blue marlin, sailfish, swordfish, wahoo, and dolphin are harvested by North Carolina fishermen. Scientists view the area as one of anomalously high biomass for the continental slope.[4] In addition to

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4 Testimony of Dr. Alan Hulbert before the Committee on Interior and Insular Affairs (Mobil NPDES Exhibit 28). Mobil refers to this testimony in its Final Brief at 25. *See* note 14, *infra*.

the significant fishery resources and the unusually abundant benthic community, marine bird populations are extensive, and turtles, whales and dolphins have regularly been observed at the site. *Id.* Many species of turtles, birds and mammals that frequent The Point are endangered and vulnerable to adverse environmental effects. The National Marine Fisheries Service (NMFS) has identified the area as extremely important to NMFS and NOAA trust resources. Memorandum from William W. Fox, Jr., Director, NMFS, to Margo Jackson, Assistant General Counsel for Ocean Services, April 9, 1991, incorporating prior NMFS comments on Mobil's proposed activities subject to a National Pollutant Discharge Elimination System (NPDES) permit (NMFS Comments).

On November 19, 1990, the State of North Carolina (State) objected to Mobil's proposed POE on the basis of a lack of necessary site-specific data and information.[5] *See* 15 C.F.R. § 930.64(d). Specifically, the State contends that there is insufficient information to make a consistency determination on the impacts arising from Mobil's activity. State Objection Letter. The State also renewed its request that Mobil complete a four-part fisheries study.[6] *Id.* The State claims that the information is necessary to determine the biological importance of the proposed drill

[5] *See* Letter from Roger N. Schecter, Director, Division of Coastal Management, to William C. Whittemore, Senior Counsel, Mobil, November 19, 1990 (State Objection Letter).

[6] The first portion of the proposed study is an investigation of larval and juvenile abundance and distribution in the vicinity of the Mobil project. The second part of the State's proposal is to gather additional information centered on the *Sargassum* community known to occur in the area of the proposed activity. The third portion of the proposed study is to measure the effects of drilling waste deposition on bottom organisms. The fourth section of the State's proposal is documentation of the commercial and recreational fishing in the vicinity of the drill site and The Point.

site area to the State's fisheries, the importance of the area to birds and marine mammals, and the economic importance of the proposed drill site area to the State's fishermen. *Id.* In addition to explaining the basis of its objection the State notified Mobil of its right to appeal the State's decision to the Department of Commerce (Department) as provided under § 307(c)(3)(B) of the Coastal Zone Management Act, as amended (CZMA), 16 U.S.C. § 1456(c)(3)(B), and the implementing regulations, 15 C.F.R. Part 930, Subpart H.

Pursuant to CZMA § 307(c)(3)(B) and 15 C.F.R. § 930.131, the State's consistency objection precludes Federal agencies from issuing any permit or license necessary for Mobil's proposed activity to proceed, unless the Secretary of Commerce (Secretary) finds that each activity described in detail in Mobil's POE, notwithstanding the State's objection, is either consistent with the objectives or purposes of the CZMA (Ground I), or otherwise necessary in the interests of national security (Ground II).[7]

II. APPEAL TO THE SECRETARY OF COMMERCE

On December 3, 1990, in accordance with CZMA § 307(c)(3)(B) and 15 C.F.R. Part 930, Subpart H, Mobil filed with this Department a notice of appeal from the State's objection to Mobil's consistency certification for the proposed POE.[8] Mobil's notice of appeal requested

[7] There are references in the record to the Deputy Secretary as the decisionmaker in this case because on May 19, 1989, then Secretary of Commerce Robert Mosbacher recused himself from issuing decisions in appeals involving oil and gas issues and delegated that authority to the Deputy Secretary. I have not recused myself from issuing this decision.

[8] Letter from William C. Whittemore, Senior Counsel, Mobil to Hon. Robert A. Mosbacher, Secretary of Commerce, December 3, 1990 (notice of appeal).

an extension of time to submit its full supporting statement, data and other information. By letter of January 8, 1991, the Department set an initial briefing schedule for the parties.[9] Mobil perfected its appeal by filing a brief with supporting information and data on February 16, 1991. The State filed an initial brief with the Department on May 21, 1992.

Mobil has also filed a separate appeal from the State's prior objection to its proposed discharge activities at the drill site. A Secretarial decision in that appeal is being issued concurrently with the decision in this appeal.[10]

The administrative record of this appeal also contains comments submitted by the public and Federal agencies. By way of notices in the *Federal Register* and local newspapers,[11] the Department requested public comments on issues raised in this appeal. Public comments were received and incorporated as part of the record of this appeal.[12] Oral and written comments were received from Mobil, the State, local public officials, the public and various interest groups. On May 5, 1991, the record closed for public comments. The Department also solicited the views of fourteen Federal agencies,[13] and the National Security Council (NSC) regarding the two grounds for a Secretarial override of the State's objection. With the exception of the Department of State and the Fish and Wildlife Service, all of the agencies and the NSC responded with comments.

As with other aspects of this appeal, the final briefing schedule and the closure of the administrative record were the subject of discussion between Mobil and the State. The parties concurrently filed their final briefs on August

[9] Letters from Gray Castle, Deputy Under Secretary for Oceans and Atmosphere, Department of Commerce, to William C. Whittemore, Senior Counsel, Mobil, and Roger N. Schecter, Director North Carolina Division of Coastal Management, January 8, 1991.

[10] Since Mobil's NPDES permit appeal and POE appeal for the Manteo Area Block 467 drill site have not been consolidated, they contain distinct administrative records upon which I will base my decisions in the two appeals. However, much of the information concerning Mobil's activities is common to the record of the two appeals. To avoid unnecessary duplication and repetition, all of the arguments, facts and documents filed by the State in the related NPDES permit consistency appeal have been incorporated by the State into its initial brief by reference. North Carolina's Response to the Secretary's Briefing Request and to Mobil's Statement of Reasons and Brief, (State's Initial Brief), at 17. Mobil has also incorporated by reference into its briefing on this appeal, certain Mobil exhibits filed in its NPDES appeal. Mobil's Initial Brief at 3, n.4. Further, some Federal agencies have included their comments for the NPDES appeal in their comments for this appeal. I will include the NPDES acronym when referring to exhibits, comments and briefs in the NPDES appeal which have been incorporated into the record of this appeal. Finally, I hope that much of the discussion of issues is similar in the decision documents for these two appeals.

[11] *See* 56 *Fed. Reg.* 12185 (March 22, 1991), 56 *Fed. Reg.* 14289 (April 8, 1991), and notices in the Carteret County *News Times* (March 29, April 3, 5, 1991) and the *Virginian Pilot* (April 1, 2, 3, 1991).

[12] On January 29, 1991, pursuant to 15 C.F.R. § 930.129, the State requested that the Secretary hold a public hearing concerning the issues raised in Mobil's appeal. Letter from Robin W. Smith, North Carolina Assistant Attorney General, to Gray Castle, Deputy Under Secretary for Oceans and Atmosphere, Department of Commerce, January 29, 1991. The Department, however, declined to hold a public hearing as requested by the State. *See* Letter from Thomas A. Campbell, General Counsel, NOAA, to Robin W. Smith, North Carolina Assistant Attorney General, March 6, 1991.

[13] Comments were solicited from the Department of Defense, Department of the Treasury, Department of State, Department of Transportation, Department of Energy, Department of the Interior, Fish and Wildlife Service, National Park Service, Minerals Management Service, Environmental Protection Agency, Federal Energy Regulatory Commission, National Marine Fisheries Service, Army Corps of Engineers and the Coastal Guard.

15, 1991.[14] The administrative record of the appeal was reopened on April 29, 1992, to accept a report from the Environmental Sciences Review Panel (ESRP),[15] entitled *Report to the Secretary of the Interior from the North Carolina Environmental Sciences Review Panel as Mandated by the Oil Pollution Act of 1990*, January 22, 1990 (ESRP Report). Finally, Mobil and the State were provided an opportunity to file responses to any issues raised by the ESRP Report.

Although all materials received have been included in the record, I have considered them only as they are within my scope of review. I will now examine threshold issues raised in the appeal prior to my determination of whether the grounds for a Secretarial override have been satisfied.[16]

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[14] Mobil's Final Statement in Support of a Secretarial Override, August 14, 1991 (Mobil's Final Brief); North Carolina's Response to the Secretary's Final Briefing Request, August 14, 1991 (State's Final Brief).

[15] The ESRP was created under § 6003 of the Oil Pollution Act of 1990, 33 U.S.C. § 2753, to assess whether the available physical oceanographic, ecological and socioeconomic information relating to the North Carolina OCS was adequate to enable the Secretary of the Interior to carry out his responsibilities under the Outer Continental Shelf Lands Act. The Deputy Under Secretary determined that while the purpose of the ESRP report differs from the purpose of this appeal, its findings may be relevant to the issues raised in this appeal. Letters from Gray Castle, Deputy Under Secretary for Oceans and Atmosphere, Department of Commerce, to William C. Whittemore, Senior Counsel, Mobil, and Roger N. Schecter, Director, North Carolina Division of Coastal Management, May 23, 1991.

[16] Both Mobil and the State have raised the issue of bias. Mobil asserts that the State's consistency position is tainted. *See* Mobil's Initial Brief at 8-10. The State asserts that the MMS has an energy production bias. *See* State's Initial Brief at 58, State's Final Brief at 6. I will accord, however, what I determine to be the appropriate weight to comments received in this appeal.

III. THRESHOLD ISSUES

A. *Compliance with the CZMA and Its Regulations*

Commerce regulations at 15 C.F.R. Part 930, Subpart E—"Consistency for Outer Continental Shelf (OCS) Exploration, Development and Production Activities" set forth the rules which specifically govern the review of OCS activities by state reviewing agencies for consistency with state-approved coastal management programs pursuant to the CZMA. These regulations incorporate by reference general consistency review requirements found in other subparts of 15 C.F.R. Part 930.

Mobil argues that the State's objection fails to comply with the requirements of 15 C.F.R. §§ 930.64(d) and 930.79(c). 15 C.F.R. § 930.79(c) incorporates by reference the general requirements of § 930.64(d) and specifically provides that a state may object to Federal license or permit activities described in detail in an applicant's POE based on the applicant's failure to provide information defined in the regulations, if the State submits to the applicant a written request which describes the nature of the information requested and the necessity of having this information for making a consistency determination. Mobil contends that it supplied all the necessary information for the State to perform its consistency review, and that the State never requested from Mobil in writing the particular POE information which the State now requests on appeal in violation of the procedural requirements of 15 C.F.R. § 930.64(d) and § 930.79(c). *See* Mobil's Initial Brief at 4.

The record of this appeal indicates, however, that the State did request from Mobil specific information regarding the drilling operation which the State deemed necessary to make a consistency determination. *See* State Ob-

jection Letter and correspondence cited therein. The State's requests for a four-part fisheries study from Mobil were made in writing to Mobil, and in fact, are the basis for the State's prior objection to Mobil's proposed drilling discharge activities which are a part of its overall exploration efforts at the Manteo site. *Id.* Moreover, Mobil has been well aware of the State's fisheries concerns even before the State objected to its POE consistency certification. Based on the State's informational concerns on the four-part fisheries study, alone, I find that the State has complied with the requirement of 15 C.F.R. § 930.64(d) that it make its concerns known to Mobil. After examining the State's objection, I have therefore determined that the State has complied with the requirements of the CZMA and its implementing regulations for properly lodging an objection.[17] *See* CZMA § 307(c)(3)(B); 15 C.F.R. §§ 930.64(a), (d); 930.79(c).

B. *Request for a Dismissal*

The State has requested that I dismiss Mobil's Ground I claims for good cause. *See* 15 C.F.R. § 930.128. The State argues: "Good cause exists in that [Mobil] has failed to provide the Secretary with the data and information necessary to allow him to make reasonable decisions for *all* of the elements and issues raised under Ground I." State's Initial Brief at viii-ix (emphasis in original, footnotes omitted). The regulations at 15 C.F.R. § 930.128 provide a non-inclusive list of good causes that are grounds for dismissal. Based upon a review of the record of this appeal, I decline to dismiss Mobil's Ground I claims for good cause. As I will discuss in the section on

[17] *See* Decision and Findings in the Consistency Appeal of Shickrey Anton, (Anton Decision), May 21, 1991, at 3; Decision and Findings in the Consistency Appeal of Chevron U.S.A., Inc., (Chevron Decision), October 29, 1990, at 5.

burden of proof, in this case if I determine that there is insufficient data and information in the record for me to make the findings necessary for an override, rather than dismiss part of the appeal as the State has requested, I will issue a decision which will reflect my inability to make these findings.

C. *Adequacy of Information*

The parties have raised an issue as to the adequacy of information in this appeal. As stated above, the State argues that Mobil has failed to provide the necessary information and data for me to decide the elements of Ground I. State's Initial Brief at viii-ix. On the other hand, Mobil asserts that there is adequate information on the effects of the proposed POE, and that any effects are minor. *See* Mobil's Initial Brief at 15-16, 20, 29, 36.

Aside from the requirements imposed on the State for properly lodging an objection, the Appellant bears the burden of proof and the burden of persuasion. *See* Anton Decision at 4; Chevron Decision at 4-5. As stated in the Anton Decision:

> The regulations provide that the Secretary shall find that a proposed activity satisfies either of the two statutory grounds "when the information submitted *supports* this conclusion." 15 C.F.R. § 930.130(a) (emphasis added). Thus, without sufficient evidence the Secretary will decide in favor of the State.

Anton Decision at 4 (emphasis in original). Therefore, for me to find for Mobil I must make the findings specified in the regulations at 15 C.F.R. §§ 930.121 or 930.122. An absence of adequate information in the record inures to the State's benefit because such an ab-

sence would prevent me from making the required findings.[18]

I will make my decision based on the evidence in the record before me. The record contains much non-site-specific information as well as information collected for other purposes, raising the issue of the predictive value of this information as applied to this case. *C.f.* National Research Council, "Drilling Discharges in the Marine Environment" (1983) (NRC 1983 Report) at 6. I note this statement of the National Research Council (NRC):

> Marine ecosystems on the OCS clearly vary in their sensitivities to anthropogenic stress, and caution is therefore advisable in extrapolating observations from one region to another. On the other hand, to dismiss all research results not obtained directly from the environment analyzed may amount to ignoring valuable data.

NRC 1983 Report at 137. In evaluating the information in the record, I will necessarily determine the adequacy of the information for determining whether Mobil has satisfied the two grounds for a Secretarial override,[19]

[18] The State objection in the Decision and Findings in the Consistency Appeal of Long Island Lighting Company, (LILCO Decision), February 26, 1988, was based on lack of information. In that case, the Secretary found that the record contained sufficient information, in particular comments from Federal agencies, for him to make a finding that the Appellant's Project would have no adverse effects on the natural resources of the state's coastal zone. *See* LILCO Decision at 12-13.

[19] The Secretarial override process is a separate and independent decision-making function from the State's consistency review process. *See* Anton Decision at 3; Chevron Decision at 5. Since the State's consistency review and the Secretarial override process are based on different evaluative criteria, the adequacy of information for these two determinations may differ. In addition, the administrative records for these two determinations may differ.

recognizing that some information and conclusions contained in the record may not be directly applicable to the facts of this case. The two parameters for adequacy which I will use are completeness of information and scientific quality of information.

In its 1989 report, the NRC recognized that the quantity and types of ecological information needed generally varied with the stage of the overall project, with less site-specific needed for leasing decisions, more site-specific information needed for exploration decisions, and still more information needed for a decision to develop and produce hydrocarbon resources. *See* National Research Council, "The Adequacy of Environmental Information for Outer Continental Shelf Oil and Gas Decisions: Florida and California" (1989) (NRC 1989 Report) at 42-43; Mobil's Final Brief at 26-27. Moreover, the NRC generally identified the information necessary for leasing, exploration, development and production decisions. *See* NRC 1989 Report at 43. I agree with the conclusions of the NRC on this point.[20] Therefore, I find that for me to adequately identify the impacts of the proposed project, the record should disclose, at a minimum, a characterization of the environment, an identification of the biological resources at risk, and an identification of basic ecological relationships. *See* NRC 1989 Report at 5.

The NRC provides further guidance, which I adopt in this case, as to the nature of the information necessary to make an informed decision. This necessary information would include (1) a characterization of major habitat types; (2) a catalog of representative species (or major species groups) present in the lease area; and (3) seasonal

[20] Mobil also agrees that the 1989 National Research Council Report provides important guidance. *See* Mobil's Initial Brief at 30.

patterns of distribuion and abundance. NRC 1989 Report at 43. Furthermore, in addition to this information which the NRC states is generally necessary to make an informed leasing decision, the record should generally disclose (1) basic ecological information (*e.g.*, habitat, feeding behavior and reproduction); (2) basic information on factors determining vulnerability of various species; and (3) information on the potential effects of various agents of impact. NRC 1989 Report at 43.

The adequacy of information will also depend on the likelihood [21] of an impact as well as on the potential extent or severity of an impact. *C.f.* Chevron Decision at 44; Decision and Findings in the Consistency Appeal of Exxon Company, U.S.A., (Exxon SRU Decision), November 14, 1984, at 15; NRC 1989 Report at 54, 59-60. As stated by the NRC, where unique habitats or endangered and rare species exist, more extensive characterization of the sensitivity of biota to OCS activities, recovery rates, and identification of mitigating measures may be required before leasing. NRC 1989 Report at 43. Generally, less information is necessary where the likelihood or the extent of impacts may be low, and more information is necessary where the likelihood or the extent of impacts may be high.[22]

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21 The North Carolina Environmental Science Review Panel states:

> Risk assessment clearly and appropriately requires application of probability theory to permit proper evaluation of proposed OCS activities, but the use of probability in determining standards of completeness of environmental information gathering should be largely limited to exclusion of exceedingly improbable events from extensive evaluation.

ESRP Report at 81.

22 Since I have determined that the proposed drill site area contains unique habitats and endangered and rare species, there must be more extensive characterization of the sensitivity of biota to Mobil's OCS-related activities, because the possible extent of adverse impacts will be higher. *See* NRC 1989 Report at 5.

IV. GROUNDS FOR OVERRIDING A STATE OBJECTION

Pursuant to CZMA § 307(c)(3)(B) and 15 C.F.R. § 930.131, Federal licenses or permits required for activities described in detail in Mobil's POE may be granted despite the State's consistency objection if I find that each activity described in detail in Mobil's POE is (1) consistent with the objectives or purposes of the CZMA (Ground I), or (2) is necessary in the interest of national security (Ground II). *See also* 15 C.F.R. § 930.130(a). The Appellant has pleaded both grounds. The Department's regulations interpreting these two statutory grounds are found at 15 C.F.R. § 930.121 and § 930.122.

A. *Ground I: Consistent with the Objectives or Purposes of the CZMA*

The first statutory ground (Ground I) for overriding the State's objection to the proposed project is that the activity is consistent with the objectives or purposes of the CZMA. To make a finding on this ground I must determine that the proposed activity satisfies all four of the elements specified in 15 C.F.R. § 930.121.

1. *Element 1: Activity Furthers One or More Objectives of the CZMA*

To satisfy Element 1 of Ground I, I must find that the activity furthers one or more of the competing national objectives or purposes contained in the CZMA. 15 C.F.R. § 930.121(a). I find that the proposed project fosters one or more of the objectives of the CZMA, and therefore Element 1 is satisfied.

Congress has broadly defined the national interest in coastal zone management to include both the protection and development of coastal resources. Consequently, as stated in previous decisions, this Element normally will be satisfied on appeal. Decision and Findings in the Consistency Appeal of Amoco Production Company, (Amoco Decision), July 20, 1990, at 14.

OCS exploration, development and production activities are included within the objectives and purposes of the CZMA. *See, e.g.*, Decision and Findings in the Consistency Appeal of Korea Drilling Company, Ltd., (Korea Drilling Decision), January 19, 1989, at 7; Decision and Findings in the Consistency Appeal of Texaco, Inc., (Texaco Decision), May 19, 1989, at 5. The Department of Energy (DOE) states that the project lies in "one of the most promising natural gas prospects on the OCS." [23] The Department of the Interior (DOI) states that development of the Manteo Area Block 467 could benefit the natural gas market of the southeastern United States.[24] Based upon a review of the record, I find that Mobil's exploration for natural gas resources at this site furthers one or more of the competing national objectives or purposes contained in §§ 302 or 303 of the CZMA.

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[23] Letter from Robert H. Gentile, Assistant Secretary, Fossil Energy, Department of Energy, to Gray Castle, Deputy Under Secretary for Oceans and Atmosphere, Department of Commerce, April 30, 1991, adopting Mr. Gentile's December 19, 1990, correspondence to Mr. Castle on Mobil's Manteo Block 467 NPDES appeal (DOE Comments).

[24] Letter from David C. O'Neal, Assistant Secretary, Land and Minerals Management, Department of the Interior, to Gray Castle, Deputy Under Secretary for Oceans and Atmosphere, Department of Commerce, June 4, 1991 (DOI Comments).

2. *Element 2: The Activity's Individual and Cumulative Adverse Effects on the Coastal Zone are Outweighed by Its Contribution to the National Interest*

In order for the Appellant to meet this Element, I must find that the disputed activity, when performed separately or when its cumulative effects are considered, does not cause adverse effects on the natural resources of the coastal zone substantial enough to outweigh its contribution to the national interest. 15 C.F.R. § 930.121(b). To perform the required balancing, I must first adequately identify the proposed project's adverse effects on the natural resources or land and water uses of the coastal zone and its contribution to the national interest. *See* Texaco Decision at 6. As stated above, if the information in the record is inadequate, such that I cannot adequately identify the adverse effects or the contribution to the national interest, I will be unable to perform the weighing, and therefore unable to find for Mobil on this Element. *See* Anton Decision at 5, n.8.

I conclude that the information in the record is insufficient for me to adequately identify the adverse coastal zone effects of the activity. Accordingly, I am unable to find for Mobil on Element 2 of Ground I.

a. *Adverse Effects on Coastal Resources and Uses*

In evaluating the adverse effects of the project on the resources of the coastal zone,[25] I must consider the ad-

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[25] The proposed exploration would occur about 39 miles from the State's coast, well outside of the State's coastal zone. Distance, alone, however, is not predictive of possible effects. The State's coastal resources are not confined to State waters, nor are potential effects confined to Federal waters.

verse effects of the project by itself and in combination with other past, present, or reasonably foreseeable activities affecting the coastal zone.[26] Other activities include accidents or improper conduct of an activity. *See* Chevron Decision at 24; Korea Drilling Decision at 10. In particular, I find that Mobil's proposed drilling discharge activities are reasonably foreseeable and will be relevant to my consideration of cumulative effects in this case.[27] I note, however, that since the consistency of NPDES permit activities is an issue distinct from the consistency of plan of exploration activities,[23] Mobil has filed a separate appeal to the State's objection to its proposed NPDES permit activities.

Probability of an Oil Spill During Exploration

Mobil asserts that the potential adverse impacts on the uses and natural resources of the coastal zone as a result of its proposed exploratory drilling must be evaluated based upon the risk of an accidental oil spill occurring during exploration. Mobil contends that the chance of an accidental oil spill occurring during exploratory drilling is extremely small and that in the event of such a spill Mobil's oil spill containment plan will adequately address the effects of a spill.

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[26] *See* Chevron Decision at 24; Texaco Decision at 6; Gulf Oil Decision at 8. Given that the probability of a hydrocarbon discovery is estimated by the MMS to be less than ten percent, I find that development and production of such reserves is not reasonably foreseeable. In this case I will consider the cumulative effects of activities occurring during the drilling period. *See* Texaco Decision at 24.

[27] *See* the accompanying decision in Mobil's NPDES permit appeal for a fuller discussion of Mobil's drilling discharge activities.

[28] *See* Texaco Decision at 4; Chevron Decision at 7; Korea Drilling Decision at 14.

In general the OCS drilling record supports Mobil's contention that the risk of an oil spill occurring as a result of a blow-out during exploratory drilling is low. MMS Environmental Assessment of Exploration Plan for Manteo Area Block 467 (EA), Exhibit F. The statistical record also indicates that an oil spill during exploratory drilling would most likely be the result of a rig-service-related event, and would involve diesel fuel and not crude oil. *See* Mobil's POE, vol. 3 at 2-1; FER at IV-13. Further, the geological data indicates that Mobil's proposed exploratory drilling operations will likely encounter natural gas, if any hydrocarbons are found. FER at III-5.

I have previously held that because some risk of a spill during oil and gas operations always exists, oil spill contingency plans are important. *See* Texaco Decision at 15. The MMS believes that Mobil's oil spill contingency plan meets or exceeds all MMS and Coast Guard guidelines. Letter from Bruce G. Weetman, Regional Director, Minerals Management Service, to Roger Eckert, Attorney-Adviser, NOAA, June 4, 1991 (MMS Comments) at 20. In particular, Mobil states that it will, among other things:

- position spill response and clean-up equipment at the drillship, at the Morehead City shore base and in the Oregon Inlet area;
- operate blowout preventer systems in compliance with MMS requirements;
- minimize operational spills of diesel fuel at the drill site or support vessel refueling docks by strict adherence to MMS and Coast Guard regulations; and
- assure full response capability, including minimum response times, to address any spill emergency.

See Mobil's Initial Brief at 44, 52-53. The MMS would also place additional restrictions on Mobil's proposed exploration of Block 467. *See* MMS Comments at 13-15.

The ESRP concluded that available information on the physical oceanography of the area is generally adequate to estimate encounter probabilities for spills that may occur during the exploration/delineation phase. ESRP Report at 28. The ESRP based this conclusion, however, on the "assumptions that an oil spill during this phase will likely occur only at the drill site platform and that the errors for the [MMS Oil Spill Risk Assessment] calculation (as performed for the Manteo site) are well enough understood to make these estimates." *Id.* The ESRP then discussed site-specific informational deficiencies relevant to the oil spill predictions. *Id.* The ESRP also concluded that information is adequate for estimating the risks involved in a service vessel accident either at the drill site or near the coast. *Id.*

Given that I found the probability of an oil spill to be low, and recognizing the elements of Mobil's oil spill contingency plan as well as the conclusions of the ESRP, I now find that the information in the administrative record on potential impacts of an oil spill is adequate for the purposes of this appeal. I also find that the predictive value of models relied upon by Mobil to predict the movement of spills in order to direct the scope and focus of its response efforts, is adequate.

Effects on Biological Resources

In this section I will examine the risk of individual and cumulative adverse effects from the proposed activity on the affected biological resources and uses of those resources.[29]

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[29] The State has asserted that Mobil has underestimated the biological importance of The Point. NMFS has characterized the natural resources found in Block 467 as unique. Letter from Andreas Mager, Jr., Assistant Regional Director, Habitat Conservation Division, National Marine Fisheries Service, to Minerals

Fish Resources:

One of the East Coast's most important commercial and recreational fisheries is located in the waters overlying the proposed drill site.[30] FER at III-83. The proposed drill site area serves as an important migratory pathway and feeding habitat for pelagic fishes. Yellowfin, bluefin, blackfin, and bigeye tuna, white and blue marlin, sailfish, swordfish, wahoo, and dolphin are caught there by North Carolina fishermen.[31] In addition, many target and prey species are believed to spawn near the western boundary of the Gulf Stream. Thus, the proposed drill site, even though it is located outside of the State's coastal zone, is situated such that an important food source for North Carolinians would be exposed to Mobil's proposed wastes.[32] Mobil states that the species composition found at the

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Management Service, Department of the Interior, December 13, 1989 (NMFS Letter). NMFS also states that the biological significance and later potential for adverse impacts is severely underestimated. *Id.* In general, the ESRP has stated that there needs to be a study of the ecological relationship between The Point's unusual biological resources and its physical properties. *See* ESRP Report at 36-37, 47.

[30] The first portion of the State's proposed study is an investigation of larval and juvenile abundance and distribution in the vicinity of the Mobil project.

[31] The Secretary's Exxon SRU Decision at 7-10 interpreted Element 2 to include adverse effects on coastal uses. In that case, Exxon's proposed OCS POE affected a thresher shark fishery important to California fishermen.

[32] In addition to citing coastal uses of The Point, the State argues that the area serves as spawning habitat for species that are important to North Carolina fisheries, including both prey and target species (menhaden, spot, croaker and flounder) that migrate into North Carolina's coastal waters. Memorandum from Bill Hogarth, Director, North Carolina Division of Marine Fisheries, to Roger Schecter, Director, North Carolina Division of Coastal Management, May 21, 1990, at 2, Attachment 6 to State Objection Letter.

drill site area is representative of the overall areal population, and that the species found were generally similar to those observed in previous collections conducted during the spring and fall months off the South Atlantic Bight and in the eastern Gulf of Mexico. *See* Mobil's Final Brief at 32-33. Upon reviewing the record, I find that while the species composition may not be unique, there is an unsual abundance of fish resources found near the drill site area, and that the area serves as an important migratory pathway, feeding habitat and spawning ground for several commercially significant species.

As to the possible effects on fishery resources, MMS states:

> [I]mpacts on fish resources may result from the effects of [the] discharge of muds and cuttings [and] treated sanitary and domestic waste. . . . Individuals may be subject to sublethal effects *before* dispersion and dilution of drilling mud [and] other waste discharges.

FER at IV-216 (emphasis added). In essence, the fishery resources, upon which the State's commercial and recreational fishing industries depend, may be exposed to and potentially affected by Mobil's wastes, with individual fish possibly subjected to "sublethal effects." [33]

MMS concludes that the expected impacts of the proposed discharges on commercial and recreational fishing would be low-level and temporary in nature. MMS NPDES Comments at 21. The record lacks information, however, on the marketability of fish which may have been exposed to Mobil's wastes and subjected to sublethal effects.[34]

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[33] *See* FER at IV-213 - 219 for a discussion of potential effects on the State's fisheries resources.

[34] *See infra* at 27 for a discussion of other potential socioeconomic effects.

MMS also concludes that under its "worst case" analysis of maximum level of impacts on fish resources, the anticipated effects would be minor and indistinguishable from natural background variability. The worst case analysis, however, has limited usefulness to my analysis for four reasons. First, as stated above, resources may be affected by Mobil's wastes *before* dispersion. Second, the analysis does not fully examine ecological effects. Third, the conclusions on natural variability may be flawed.[35] Fourth, the analysis does not fully account for cumulative impacts.

In commenting on this appeal, the National Marine Fisheries Service (NMFS) identified informational concerns regarding fisheries studies and stated that additional studies and information were needed. NMFS Comments. In comments on the DOI's Draft Environmental Report (DER)[36] on Proposed Exploratory Drilling offshore North Carolina, NMFS stated:

> The DER does not adequately address fishery issues. Discussions on effects of spills or accidents on eggs, larvae, and food organisms; recreational and commercial fishing activities; potential alterations of migratory patterns of important pelagic fishes; occurrence of latent fisheries resources; habitats; and fisheries operations in the project area are inadequate.

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[35] The ESRP states that the DOI decision documents are flawed in their discussion of the significance of natural variability. *See* ESRP Report at 45-46. The ESRP states:

> Purging from the decision documents the unjustified argument that variable ecological resources and variable driving forces do not deserve the same level of protection from environmental impacts as more invariant parameters is needed to render the interpretations and conclusions adequately defensible.

ESRP Report at 46.

[36] Given that NMPS' comments on this appeal were forwarded after the completion of the FER, one inference that can be drawn is that its prior concerns with the DER remain unresolved.

NMFS Letter. NMFS states that "many of the finfish that inhabit the site as eggs and larvae are not discussed. More information on distribution, life history aspects, and fisheries should be provided on tunas, dolphin, wahoo, and marlins." *Id.* The NMFS comments continue:

> The uniqueness of the Cape Hatteras area as a faunal mixing zone is not adequately addressed. The drill site is located near [an area] known for its value to migrating pelagic fishes. The area also is a critical feed site for tunas.

Id. NMFS also states that the "[e]cology, life history, and habitat requirements of epipelagic fishes are not well known. Accordingly there is insufficient basis for most of the assumptions made in the DER regarding potential impacts." *Id.*

Likewise, the South Atlantic Fishery Management Council informed NOAA that it agrees that there is a lack of adequate, site-specific biological and oceanographic data and information and acceptable analysis of existing information to proceed with exploratory drilling. Letter from Roy O. Williams, Chairman, South Atlantic Fishery Management Council, to Gray Castle, Deputy Under Secretary for Oceans and Atmosphere, Department of Commerce, May 13, 1991.

Upon reviewing the information in the record of this appeal, I find that I am unable to adequately assess the risk of adverse impacts to fish resources. Consequently, I am unable to adequately identify the adverse effects on fish resources. While I previously found that Mobil's studies adequately predict a rapid dispersion of wastes near the surface, I was unable to find that Mobil's wastes will have a low toxicity. Furthermore, the State's fisheries may be subjected to sublethal effects *before* dispersion and

dilution of Mobil's wastes. Finally, I find that the fish resources at the proposed drill site are sufficiently rich, and their ecology sufficiently important, to require additional site-specific information.

Benthic Communities:

Benthic communities include, among other things, both infaunal and epifaunal organisms. Densities of infauna and epifauna near the Mobil drill site have been found to be unusually high.[37] The North Carolina Division of Marine Fisheries has stated that Block 467 has the highest benthic infauna population of any deep water site on the east coast. The State argues:

> The benthic assemblages found near the drill site are unique on the western North Atlantic slope. While species diversity is low, the benthic infauna exhibit extremely high biomass and species abundances. . . . The concentrations of demersal fishes are larger than usual for this water depth.

Summary and Assessment of Ad Hoc Live Bottom Committee (State NPDES Exhibit 23) at 4. Commercially harvested demersal fishes prey on infaunal organisms.[38] *See* FER at III-82, III-101-104, 180-183. Upon reviewing the record, I find that the benthic community near the drill site is unusual for its high biomass and productivity.

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[37] The third portion of the State's proposed four-part fisheries study is to measure the effects of drilling waste deposition on bottom organisms.

[38] Mobil's sweeping statement in its Initial Brief that "there is absolutely no indication that any coastal fishes or other coastal wildlife resources utilize the benthic habitat, benthic food sources, or benthic-derived energy in any form" is belied by statements in the FER and the EA. *Compare* Mobil's Initial Brief at 45 *with* FER at III-82, III-101-104, 180-183.

Moreover, I find that benthic communities are directly linked to the food web supporting the State's fisheries.

Potential damage to benthic and infaunal communities may be physical and or chemical.[39] NRC 1983 Report at 5. Factors influencing damage to benthic communities include the type and quantity of drilling discharges, the hydrographic conditions at the time of discharge, and the height above the bottom of the discharges. FER at IV-61. The effects also depend on how quickly the benthic community recovers, not only in total density and biomass, but also in the composition and structure of the community. NRC 1983 Report at 135. Benthic communities may also be damaged from the placing and removal of drillship mooring anchors. *See* MMS NPDES Comments at 37-38.

I will evaluate the benthic impact of Mobil's discharges as well as the emplacement and removal of drillship mooring anchors on the benthic environment. Mobil's drilling plans include both near-surface and seafloor discharges. Based upon a review of the information in the administrative record, I find that there is a low likelihood that the near-surface discharges will have a measurable adverse impact on benthic communities given the water depth and the current movements. Mobil's drilling plans, however, also include seafloor discharges and anchor placement. Mobil has performed simulation modeling of the deposition of seafloor discharges, for which I found in the decision for Mobil's NPDES appeal at this site that

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[39] Upon reviewing existing information on the fates and effects of drilling fluids and cuttings on the OCS, the NRC states that "[t]he postdepositional fates of drilling fluids and the recovery of altered communities are the processes for which data are most limited and predictions most tenuous." NRC 1983 Report at 136. The NRC advises caution in extrapolating observations of adverse effects from one region to another. *See Id.* at 137.

the seafloor discharges will be distributed in the immediate vicinity of the drill site.

MMS comments that the only expected negative effects of the proposed discharges would be from the deposition of drilling muds and cuttings directly on the seafloor during the drilling of the initial portion of the well. MMS NPDES Comments at 17. In its FER, MMS states that the major effect of the release of drilling muds and cuttings directly to the seafloor will be to bury and kill local benthic organisms. *See* FER at IV-211; Appendix E of the EA at E-4. Upon reviewing the record, I find that the major short term effect of the deposition of seafloor drilling discharges will be to bury and kill benthic organisms in the immediate vicinity of the drill site. I also find, however, that possible sublethal impacts include altered burrowing behavior, chemosensory responses, alterations in embryological or larval development, depressed feeding, decreased food assimilation and growth efficiency, and altered respiration and nitrogen excretion rates.[40] Thus, I find that in the immediate vicinity of Mobil's drill site, Mobil's proposed wastes may either destroy or poison a food source for part of the State's demersal fishery resources.[41]

As to the period of the diminishment in value of these natural resources, since I am unable to conclude that the

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[40] *See* Bowler and Petrazzuolo, *Draft Ocean Discharge Criteria Evaluation, NPDES Permit No. NC0052523*, (January 29, 1990) (Mobil NPDES Exhibit 27), at 10-6. Mobil refers to this report in its Final Brief at 23, n.18.

[41] In discussing the effects of Mobil's proposed wastes on benthic communities, Mobil discounts the effects on the food supply by stating: "The primary drilling fluid to be discharged at the sea floor is simply prehydrated bentonite clay (see Appendix I-1). Bentonite clay is a naturally-occurring material that is used in cosmetics and as a food additive." Mobil's POE, vol. 1 at B17-21.

benthic community would be accustomed to burial of the magnitude envisioned in the modeling studies, I decline to accept Mobil's argument that the area will become rapidly repopulated. Rather, as indicated in the FER, I find that recovery of these deep set fauna could take several years and the recolonizing community may be significantly different from the pre-drilling one.[42] FER at IV-212.

MMS has also stated that the emplacement and removal of drillship mooring anchors will cause localized destruction of benthic organisms. MMS NPDES Comments at 38. I agree with MMS' conclusion, however, upon review of the record, I find that the possible extent of this damage should be minimal.

Finally, NMFS and the ESRP have raised informational concerns on the possible impacts of Mobil's proposed waste discharges on the ecology of the benthic community. NMFS comments that the relationship between the high benthic infauna population and the proposed action should be addressed. *See* NMFS Letter. The ESRP states that a survey of the seafloor in the vicinity of the Manteo Unit should be completed prior to initiation of exploratory drilling, and that "the limited knowledge of the geographical extent of the unusual benthic community around the Manteo drill site is inadequate to describe what fraction of this system would be at risk during deposition of muds and cuttings." ESRP Report at 39. The ESRP states that this benthic survey should identify the geographic extent and degree of uniqueness of the unusual benthic community. ESRP Report at 45. I agree with NMFS and the

[42] The ESRP has indicated that the question of the recovery rate of the benthic community from the effects of Mobil's proposed wastes is unanswered. *See* ESRP Report at 48-49. The NRC states that recovery rates from complete annihilation can be many years on the continental slope. NRC 1983 Report at 136.

ESRP. I find that while the record identifies certain adverse effects, I am unable to adequately assess other ecological impacts of Mobil's proposed action on the benthic communities.

In summary, I found that the benthic communities are directly linked to the food web supporting the State's fisheries. While I found that the effects of Mobil's near surface discharges on the benthic environment will be minimal, I found that Mobil's seafloor discharges are likely to damage or destroy benthic communities in the immediate vicinity of Mobil's proposed drill site. I also found that the recovery period for this richly populated area could be several years. Finally, I found that there is presently inadequate information for me to adequately assess other ecological impacts on the benthic communities.

Plankton and Near Surface Resources:

The near surface environment includes a *Sargassum* community as well as planktonic and nektonic organisms.[43] The *Sargassum* communities provide habitat, food and protection to juvenile finfish and endangered sea turtles, and are closely connected to the State's fisheries. Tuna and dolphin feed on juvenile fish, crabs, and shrimp which occur in the *Sargassum* community.[44] Phytoplankton and zooplankton constitute a major portion of the food base

[43] *See* FER III-65 - III-70 for a summary of information collected on the *Sargassum* community known to occur in the area of the proposed activity. The second part of the State's proposed four-part fisheries study is to gather additional information centered on the *Sargassum* community. The State has designed the study to investigate the abundance and size of *Sargassum* rafts near Block 467 and summarize information on the *Sargassum* community as a source of food for various fish species.

[44] Mobil's Final Ocean Discharge Criteria Evaluation Report (Mobil NPDES Exhibit 19), December 8, 1989, at 36. Mobil refers to this exhibit in its Final Brief at 31.

for pelagic food webs.[45] In addition, most fish have planktonic eggs and larvae. Mobil NPDES Exhibit 19 at 28.

Mobil claims that any impacts on *Sargassum* communities and other near surface resources will be negligible. *See* Mobil's Initial Brief at 45-48. Mobil claims that due to the rapid dispersion of the discharges and the naturally short regeneration times of planktonic species, there will be minimal short term impacts. Mobil's Initial Brief at 48-49

Plankton and near surface organisms could be affected by Mobil's drilling discharges and hydrocarbon releases. *See* Mobil's Initial Brief, Attachment One; FER at IV-207. If plankton come in contact with drilling discharges, the photosynthetic production of phytoplankton could be reduced due to increased turbidity of the water; filter feeding and respiratory functions could be harmed by contact with particulates; and there may be lethal or sublethal effects. *Id.* These effects would vary depending on the currents. The FER concludes, however, that:

> While it is not known with certainty whether the availability of phytoplankton as a food source for zooplankton grazers eventually affects the abundance or productivity of major fisheries, drilling discharges are not expected to result in measurable impacts on populations of phytoplankton or on the marine food web.

FER at IV-207; *see also* EA at 51. MMS also states that its "worst case" analysis looked at the possibility of the proposed discharges contacting the "sensitive" *Sargassum*

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45 Bowler and Petrazzuolo, *Draft Ocean Discharge Criteria Evaluation, NPDES Permit No. NC0052523*, January 29, 1990. (Mobil NPDES Exhibit 27), at 6-1. Mobil refers to this exhibit in its Final Brief at 23, n.18.

communities. MMS NPDES Comments at 51. MMS concluded that there would be no anticipated measurable effects on the *Sargassum* or associated organisms, including fish, species fed on by fish, and marine turtles. MMS NPDES Comments at 51. MMS also states that any effects on fish eggs and larvae would be minimized due to the proposed shunting of the discharges 25 feet below the sea surface. MMS NPDES Comments at 20.

In addition to expressing the view that there is inadequate information on the ecology of the drill site, NMFS states that "the DER fails to address adequately the concentration of marine fauna along thermal and salinity fronts and the potential consequence of oil spills and other toxic releases along these fronts." NMFS Letter.

The ESRP states that ecological information on the functioning of the *Sargassum* community is inadequate. *See* ESRP Report at 35-38. In addition, the ESRP states that what is needed is an "enhanced understanding of the processes that control the function and production of this *Sargassum* system." ESRP Report at 38.

Based upon a review of the information contained in the record, I find that for the purposes of this appeal, there is inadequate information on the effects of the proposed activity on near-surface and planktonic resources. While I accept the conclusions that the near surface discharges will be rapidly dispersed, given the potential ecological importance of the *Sargassum* community to the State's fisheries, and the presence of sensitive larval forms of the State's fisheries, I find that the potential for significant impacts is great enough to merit further study before an informed decision can be made.

Marine Mammals:

There are several species of cetaceans and pinnipeds which can be found in the waters off North Carolina, and which

can be grouped into regularly occurring species, migratory species, and rare or unknown-occurrence species.[46] *See* Mobil NPDES Exhibit 27 at 6-24. As with many of the State's coastal resources, the range of marine mammals may include both State and Federal waters. Several species are endangered or threatened or recognized as species of undetermined status by the State and intrascientific community. Mobil NPDES Exhibit 27 at 6-25. The record contains biological summaries for species of marine mammals that frequent this area. *See* FER at III-192–III-222.

The following possible adverse effects have been disclosed in the record. Underwater noise generated by drilling activities could affect cetaceans. FER at IV-220, 225. Vessel and aircraft traffic could produce startle reactions in cetaceans. FER at IV-222. Certain wastes may produce sublethal effects on cetaceans. *See* FER at IV-223-224. Turbidity could affect the sight and echolocation capabilities of some marine mammals if they swim within the discharge plume. Prey species of cetaceans could be displaced and the prey-locating ability of predators could be diminished by the presence of mud particles in the water column. FER at IV-64. The FER also points out, however, that only predators in a weakened physical state would experience any effects if they were unable to move to a nearby area where prey is obtainable. FER at IV-64.

In spite of the evidence suggesting possible harassment of, and injury to, marine mammals, Federal agencies offered few other comments on the proposed project's effects on marine mammals. In particular, NMFS, the Federal

[46] In its NPDES objection letter (included as an attachment to the State's POE objection letter) the State indicated that it wanted information on use of the site by marine mammals, specifically idenifying numbers of individuals, numbers of species, and activities by species at the site.

agency with jurisdiction over certain marine mammals, provided few specific comments on the need for information on marine mammals. MMS concluded that the level of impacts on marine mammals is considered to be very low. FER at IV-224, 227.

After reviewing the information in the record on the effects of the proposed project on marine mammals, I find that the information is sufficient for the purposes of this appeal and that the individual and cumulative effects of the proposed project will be minimal. In assessing the risk of possible injury to the endangered and threatened marine mammal population, I note that while the extent of the harm could be high to the marine mammals' diminished numbers, the likelihood of damage will be low due to the rapid dilution of near-surface wastes and the temporary nature of the drilling activity. I find that any harassment of marine mammals is likely to be temporary. In making these findings I note that NMFS has expressed few specific concerns as to the effects of the proposed project on marine mammals.

Sea Turtles:

Five species of endangered or threatened sea turtles are found within the coastal and offshore marine habitats of North Carolina.[47] *See* FER at III-222-237. The endangered species are the Kemp's ridley (*Lepidochelys kempi*), hawksbill (*Eretomochelys imbricata*), and leatherback turtle (*Dermochelys coriacea*). The green turtle (*Chelonia mydas*) and loggerhead turtle (*Caretta caretta*) are classified as threatened. FER at III-222.

[47] In its NPDES objection letter (included as an attachment to the State's POE objection letter) the State indicated that it wanted information on use of the site by sea turtles. Specifically, the State wants information on numbers of individuals, numbers of species, and activities by species at the site.

Potential impacts to sea turtles include underwater noises, vessel and aircraft traffic, drilling discharges and hydrocarbon releases. *See* FER at IV-229-231. Juvenile green and loggerhead turtles, and possibly those of other species, could be exposed to Mobil's wastes. *See* EA at E-8. In addition, prey species of sea turtles could be displaced and the prey-locating ability of predators could be diminished by the presence of mud particles in the water column. FER at IV-64.

Mobil argues, however, that the proposed activity is expected to have few impacts on turtles in the area. Mobil states that the drilling would not alter natural currents and would not disrupt the *Sargassum* mats which provide habitat to juvenile turtles.[48] Mobil states that sea turtles can easily avoid ships and that the turtles will be protected by NPDES permit conditions, including subsurface shunting of discharges. *Id.*

MMS states that due to the primarily inshore distribution of marine turtles during the proposed drilling period, the impacts of the proposed project are likely to be minimal. *See* FER at IV-231. Planktonic prey species such as jellyfish are unlikely to be displaced by the discharges. FER at IV-230. A temporary increase in water turbidity could, however, affect a turtle's ability to detect prey. *Id.* MMS based its conclusions principally on the limited areal extent and duration of the discharge plume. *See* EA at E-8.

Other Federal agencies offered few other comments on the proposed project's effects on sea turtles. In particular, NMFS, the Federal agency with jurisdiction over endan-

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[48] Mobil's Comments and Responses to Issues of Concern for Draft NPDES Permit for Manteo Block 467 Exploratory Well Discharges (Mobil NPDES Exhibit 18), May 1990, at 51. Mobil refers to this exhibit in its Final Brief at 31.

gered sea turtles, provided few specific comments on the need for information on sea turtles.

The ESRP concludes that the ecological information on the *Sargassum* community as habitat for juvenile sea turtles is inadequate for all phases of oil and gas resource exploitation. *See* ESRP Report at 8, 37, 48. The ESRP states that "knowledge of the spatial and temporal abundance of hatchling sea turtles in the *Sargassum* community of the western wall of the Gulf Stream is inadequate to evaluate the risks of oil and gas activities on these endangered and threatened species." ESRP Report at 37.

After reviewing the information in the record on the effects of the proposed project on sea turtles, however, I find that the information is sufficient for the purposes of this appeal and that the individual and cumulative effects of the proposed project will be minimal. In assessing the risk of possible damage to the endangered and threatened sea turtle population, I note that while the extent of the harm could be high to the turtles' diminished numbers, the likelihood of damage will be low because of the rapid dispersal of near surface discharges and the primarily inshore distribution of sea turtles during the drilling period. In making these findings I also note that NMFS has expressed no specific concerns as to the effects of the proposed project on endangered or threatened sea turtles.

Birds:

The Manteo area is used as a feeding ground by many resident and migratory species of seabirds which also frequent the State's coastal zone. The waters along the western edge of the Gulf Stream off Cape Hatteras are an important feeding area for several species. MMS indicates that the birds identified in the FER constitute an important ecological, economic, and aesthetic resource within North Carolina's coastal zone. *See* FER III-238.

Some of the species are either endangered or threatened. The cahow (endangered) may be found on the North Carolina OCS. Mobil NPDES Exhibit 27 at 6-28. Coastal endangered and threatened species that may be present in the project area include the peregrine falcon (endangered), bald eagle (endangered), piping plover (threatened), and the roseate tern (threatened). Mobil NPDES Exhibit 27 at 6-28.

The Fish and Wildlife Service (FWS) has stated that it is concerned about the potential indirect impacts of exploratory drilling on seabirds. Memorandum from Regional Director, FWS, Atlanta, to MMS Regional Director, Atlantic OCS Region, December 22, 1989, (Attachment Four to Mobil NPDES Exhibit 18). Of particular concern to the FWS is that the only known concentration of the rare black-capped petrel (*Pterodroma hasitata*) at sea occurs specifically in and around the drilling site, with numbers peaking in May, August, and late December through early January. *Id.* The FWS also stated that black-capped petrel specimens have had high levels of mercury relative to other seabird species collected within the lease sale area. *Id.* The FWS recommended the establishment of a monitoring program.

In its FER, MMS identified the following possible adverse effects on birds. Birds could experience startle reactions from aircraft noise and vessel traffic. FER at IV-233. Specifically, since the bald eagle and piping plover are known to nest during the period proposed for exploration, aircraft noise between the drill site and the Michael J. Smith Field in Beaufort could cause adults to abandon the nest. FER at IV-234. MMS concluded, however, that this possible effect is unlikely given that, on the average, there will only be two aircraft flights per day. *Id.* MMS also states that there is no evidence that the helicopter flights will impinge on critical feeding areas.

Id. As to possible effects from drilling muds and cuttings, MMS concluded that direct contact with, or contamination by, muds and cuttings are not considered likely for the Bermuda petrel, roseate tern, or other endangered species. *Id.* However, prey species of marine birds could be displaced and the prey-locating ability of predators could be diminished by the presence of mud particles in the water column. FER at IV-64.

Based on the evidence in the record, I find that for the purposes of this appeal there is adequate information on the possible effects of Mobil's proposed activity on birds, an important ecological, economic, and aesthetic resource within North Carolina's coastal zone. In considering the risk of potential impacts upon birds, I find that the individual and cumulative impacts of Mobil's proposed activity on birds will be minimal. In particular, I note that while the impacts on endangered or threatened species could be great given their diminished numbers, the likelihood of impacts will be small given the nature and duration of possible impacts.

Air Quality

Activities associated with Mobil's proposed exploration of Manteo Area Block 467 will emit air pollutants. *See* FER at IV-205. Upon reviewing the information in the record, however, I find that the information is adequate for me to conclude that there will not be any significant impacts (including cumulative impacts) on the State's air quality.

Water Quality

Mobil's proposed drilling discharges will affect water quality near the drill site. Mobil asserts, however, that its discharges will have no impact on the water quality of the State's coastal zone. Mobil's Initial Brief at 49. In

its briefing for Mobil's NPDES permit appeal for the Manteo drill site the State disputed Mobil's claims on water quality. The State asserts in this appeal that Mobil's water quality study leaves many unanswered questions. State's Initial Brief at 67.

MMS states that the effect of drilling discharges on offshore water quality has been the subject of numerous field monitoring programs. MMS NPDES Comments at 13. MMS states that the expected effects of drilling effluent on water quality are short-term, minor, and that water quality parameters are anticipated to return to background concentrations within a few hundred meters of the point of discharge. MMS NPDES Comments at 15. MMS predicts that there will be no impact on water quality of the State's coastal zone. Other agencies offered few specific comments on the proposed project's effects on water quality.

Upon reviewing the information in the record, I find that the information is adequate for me to conclude that there will be no significant impacts on the State's water quality, given the location of the drill site and the dynamic current regime.

Socioeconomic Effects

Having previously considered the effects of the proposed POE on the resources of the coastal zone which in turn affect the coastal uses,[49] in this section I will focus on other possible adverse effects of the proposed POE on uses of the State's coastal zone.[50] Important economic

[49] Natural resource damage valuation is based in part on the value of the uses of those resources. *See, e.g.*, Oil Pollution Act § 1006(d), 16 U.S.C. § 1432(6).

[50] The MMS states that North Carolinians living in eastern North Carolina in general have "fewer job opportunities, greater unemployment, higher levels of dependency, and lower incomes than North Carolinians living elsewhere in the State." FER at III-297. I will consider these comments when assessing the extent to which Mobil's proposed project furthers the national interest in economic development.

activities in the State's coastal zone include agriculture, tourism, recreation, forestry, and commercial fishing. FER at III-313-315.

The primary coastal use at issue in this case is the commercial and recreational fishing industry.[51] The proposed exploration area contains important concentrations of epipelagic, bluewater fish and The Point is one of the most productive offshore fishing grounds along the east coast. *See* FER at III-83. Over the year, The Point is the most frequently and intensively fished area by the Oregon Inlet charter boats, private recreational and commercial bluewater fleet. The area's reputation for large blue marlin has prompted several local billfish tournaments. The fishing industry may be affected by space use conflicts, both from drillship activities and increased vessel traffic.[52] The drillship will be in place for approximately 114 days between May and October. This time period coincides with much of the fishing season. FER at IV-217. During this time period there could be as many as 100-125 boats engaged in fishing near The Point and the drill site.[53]

[51] The fourth part of the State's proposed study would be documentation of the commercial and recreational fishing in the vicinity of the drill site and The Point. This part of the study would be accomplished by surveying commercial and recreational fishermen on specific days upon returning to various ports in North Carolina. The information obtained, along with some field data, would be used to document the importance of the area as a fishery.

[52] *See also* discussion, *supra* at 16.

[53] Testimony of John Bayless, Oregon Inlet Sportfishing Guides Association (State NPDES Exhibit 26-A).

In commenting on this appeal, Federal agencies differed in their assessment of the potential effects on the fishing industry. MMS concludes that impacts on the fishing industry are expected to be low. FER at IV-219. MMS stated that interference from the placement of drillship anchors would be minimized by the placement of surface buoys and a notice to mariners. MMS NPDES Comments at 38. MMS also concluded in its FER that interference from support vessel traffic would be minimal. *See* FER at IV-242-243.

I agree that the space use impacts will be temporary in that they are scheduled to last for about 114 days. There is unrefuted evidence that the fishing industry seasonally concentrates near the drill site, however, indicating that there will be a high likelihood of impacts. I find, however, that the potential extent of those space use impacts will be minor given that Mobil plans to drill only one exploratory well. In evaluating the information in the record, I therefore find that the information is adequate for me to conclude that the space use impacts upon the fishing industry will be minor.

The ESRP concludes that, in general, socioeconomics is the most neglected area in the primary documents dealing with exploratory drilling at the Manteo site. *See* ESRP Report at 58. The ESRP made a number of general comments on the inadequacy of existing socioeconomic information. *See* ESRP Report at 59-60. Furthermore, the ESRP recommends that a base case characterization analysis, community studies, studies on aesthetic and perceptual issues, studies on infrastructure, and a socioeconomic monitoring study should be initiated as soon as possible, especially since these studies were not done at the leasing phase. *See* ESRP Report at 61-63.

Upon reviewing the information in the record of this appeal, I am unable to adequately identify the extent of the

individual and cumulative adverse socioeconomic effects resulting from Mobil's proposed POE. Given that this is a frontier area and an area of rich natural resources upon which the State heavily depends, socioeconomic impacts must be more fully addressed.

Conclusion on Adverse Effects

I have evaluated the information in the record on adverse effects of Mobil's proposed POE on the natural resources and uses of the State's coastal zone. I found that the exploration will have adverse effects on the resources and uses of the State's coastal zone. In particular, I found that the exploration will affect the benthic environment, which is linked to the State's fisheries. Moreover, based on a review of the record, I have identified informational concerns sufficient that I am unable to adequately assess the risk of impacts of Mobil's proposed POE, and so, I am unable to adequately identify the individual and cumulative adverse effects of Mobil's proposed POE.

I note that the NRC stated in its 1989 report that "[t]he basic information needed to make a leasing decision anywhere includes a characterization of the environment, identification of the biological resources at risk, and a basic understanding of ecological relationships." NRC 1989 Report at 5. Even at this post-leasing stage, I find that Mobil has not adequately documented the biological resources or ecological relationships at risk. While the overall likelihood of impacts may be low, to say that the models of a worst case scenario obviate the need to understand any ecological relationships between the State's fisheries and the *Sargassum* or benthic communities is too facile an explanation for me to accept, given that the potential extent of impacts may be high.

Furthermore, the 1989 NRC report indicates that where unique habitats and endangered and rare species exist,

more extensive characterization of the sensitivity of biota to OCS-related activities, characterization of recovery rates, and identification of mitigating measures is needed. NRC 1989 Report at 5. I am persuaded that the biological resources of the drill site area are sufficiently rich and unique to merit further investigation. I am also persuaded that the fisheries located at the site are an important part of the State's coastal zone, and that there may be potential risks of contamination of sensitive fish larvae. I find that Mobil has not adequately accounted for the effects of reasonably foreseeable effects resulting from increased currents or adverse weather conditions. I am persuaded that the ecological relationship of the benthic environment to the State's fisheries must be further assessed in order to adequately evaluate the risk of impact of Mobil's proposed activities. Finally, I find that Mobil has not adequately assessed the risk of its impacts on the socioeconomic uses of the State's coastal zone.

b. *Contribution to the National Interest*

The national interests to be balanced in Element 2 are limited to those recognized in or defined by the objectives or purposes of the CZMA. *See* Korea Drilling Decision at 16. Since our national interests are not static, however, the Secretary has noted that there are several ways to determine the national interest in a proposed project, including seeking the views of Federal agencies, examining Federal laws and policy statements from the President and Federal agencies, and reviewing plans, reports and studies issued by the Federal agencies. *See* Decision and Findings in the Consistency Appeal of Union Oil Company of California, (Union Decision), November 9, 1984, at 15. These sources of information can assist the Secretary in determining the current national interest in a proposed project.

I find that Mobil's proposed one-well OCS exploration would make a minor contribution to the national interest.

Energy self-sufficiency through oil and gas production is a recognized goal of the CZMA and the Secretary has previously held that it furthers the national interest under this Element. *See* Exxon SRU Decision at 11. Moreover, the record of this appeal indicates that energy self-sufficiency through natural gas production continues to be in the national interest.[54] Of those Federal agencies that commented on the issue of the national interest in the Appellant's proposed activity, most expressed support for domestic energy projects. The DOI states that "[a]n important discovery, such as the Manteo Prospect may represent, is an essential component in maintaining self-sufficiency in clean burning, environmentally safe natural gas." DOI Comments. In § 6003 of the Oil Pollution Act of 1990, however, Congress found that the Outer Banks is an area of "exceptional environmental fragility and beauty" and that there are concerns about the adequacy of the scientific and technical information underlying oil and gas exploration decisions in this area. *See* 33 U.S.C. § 2753(b). Based upon a review of the record, I find that there is a national interest in the *informed* exploration for natural gas resources at this site, such that potential risks have been fully evaluated.

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[54] A report on the national energy strategy states, however, that energy self-sufficiency is an unachievable goal, and that the only achievable national energy strategy goal is one of mitigation of economic damage potential arising from violent fluctuations in either the supply or price of oil. *See* National Energy Strategy—Executive Summary, (State Exhibit 63), February 1991, at 6. Mobil also discounts the policy of energy self-sufficiency by stating that "so long as normal trade relations exists, it hardly matters whether the import level [of oil] is 10 percent, 40 percent, or 60 percent." Advertisement entitled "Unnatural History" placed by Mobil in the *Wall Street Journal*, November 9, 1989, (State Exhibit 63).

In order to perform the required balancing for Element 2, I must also identify the *extent* of the national interest contribution of Mobil's one-well drilling proposal. In this case I will consider the potential size and likelihood of natural gas recovery as well as the degree to which the proposal is based on informed decision-making, such that potential risks have been fully evaluated.[55] As evidenced by comments from MMS and the DOI, exploration could result in the recovery of five trillion cubic feet of natural gas.[56] I find that there is a potential for a large discovery.[57] The State requests that I consider the lack of in-place infrastructure when taking into consideration the probability that natural gas can be recovered at the site. State's Final Brief at 16-17. Given that I have found that if natural gas is discovered it will probably be in a large amount, I find that the size of the discovery will outweigh the costs of bringing the natural gas to market. As to the likelihood of a natural gas discovery, in its comments on this appeal, MMS has stated:

> Without a discharge permit, even drilling a single exploratory well on the Manteo Prospect, with estimates of hydrocarbon resources as great as 1 billion barrels of oil equivalent in the form of 5 trillion cubic feet (tcf) of natural gas, would have to be questioned given that *the chance of encountering hydrocarbons is only 10 percent or less.* (Emphasis added.)

MMS NPDES Comments at 8. Accordingly, there is a 90 percent chance that no hydrocarbons will be found, a small likelihood of discovery.

Informed exploration is in the national interest, however, even if there is no discovery of hydrocarbons.[58] In this case, pursuant to § 6003 of the Oil Pollution Act in which Congress noted the importance of informed decision-making in this area, the ESRP concluded that adequate information is lacking for even an informed leasing decision, let alone an informed decision to explore. I therefore find that Mobil's drilling proposal contributes less to the national interest because it contains informational deficiencies as identified by the ESRP.

Above, I found that the potential size of the discovery is large. However, there is a 90 percent chance that no hydrocarbons will be discovered at the site and that Mobil's drilling proposal contributes less to the national interest because it contains informational deficiencies as identified by the ESRP. Based upon a review of the record, I find that Mobil's proposed one-well OCS exploration would make a minor contribution to the national interest.

c. *Balancing*

I have evaluated the information in the record on adverse effects of Mobil's proposed POE on the natural resources and uses of the State's coastal zone. I found that the

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[55] The parameters influencing contribution to the national interest will depend on the facts of each case.

[56] MMS geologists characterize the five trillion cubic feet estimate as optimistic. FER at II-6.

[57] While the estimated potential hydrocarbon reserve would be found under approximately 21 lease blocks, Mobil's POE covers only one well in one lease block. *See* Mobil's Initial Brief at 19; Mobil's POE, vol. 1 at A1-4, A1-9. The MMS states that production of five trillion cubic feet of natural gas would involve the drilling of approximately 103 wells. FER at IV-13.

[58] Whether or not gas will be discovered, the exploration itself furthers the national interest by ascertaining information on available hydrocarbon reserves. *See* Texaco Decision at 30-31; Amoco Decision at 45.

exploration will have adverse effects on the resources and uses of the State's coastal zone. In particular, I found that the exploration will affect the benthic environment, which is linked to the State's fisheries. Moreover, based on a review of the record, I have identified informational concerns sufficient that I am unable to adequately assess the risk of impacts of Mobil's proposed POE, and so, I am unable to adequately identify the individual and cumulative adverse effects of Mobil's proposed POE.

I have evaluated the information in the record on the contribution of the proposed activity to the national interest. I found that the proposed one-well exploration plan would make a minor contribution to the national interest.

Because I cannot adequately identify the extent of the individual and cumulative adverse effects of the proposed activity, I am unable to perform the required balancing of the adverse effects against the contribution to the national interest. Consequently, I cannot find that the national interest benefits of Mobil's proposed POE outweigh the proposed activity's adverse effects on the State's coastal resources and uses.

3. *Element 3: Activity Will Not Violate The Clean Water Act or the Clean Air Act*

To satisfy Element 3 of Ground I, I must find that "[t]he activity will not violate any of the requirements of the Clean Air Act, as amended, or the Federal Water Pollution Control Act, as amended." 15 C.F.R. § 930.121(c). The requirements of the Clean Air Act and the Federal Water Pollution Control Act are incorporated into all State coastal programs approved under the CZMA § 307 (f). I conclude that the activity meets the requirements of the Clean Water Act and the Clean Air Act, and therefore satisfies Element 3 of Ground I.

a. *Clan Water Act*

Sections 301(a) and 402 of the Federal Water Pollution Control Act (Clean Water Act or CWA), 33 U.S.C. §§ 1311(a) and 1342, provide that the discharge of pollutants is unlawful except in accordance with an NPDES permit issued by the EPA. Mobil submitted its application for an NPDES permit to the EPA on August 18, 1989.

It is important to note, here, that the scope of the appeal is identified by the scope of the activities described in detail in Mobil's POE, as well as their individual and cumulative effects on the uses and natural resources of the State's coastal zone. While Mobil's NPDES permit activity is not described in detail in its POE (and is the subject of another appeal to the Secretary of Commerce), the effects of that proposed activity are properly considered within the scope of this appeal as well.

EPA must prescribe appropriate terms and conditions in an NPDES permit for discharges associated with OCS activities. In its comments on this appeal, EPA repeated the comments it made in Mobil's NPDES permit appeal for the Manteo drill site:

> Compliance with all conditions of the NPDES permit, if consistency is resolved and the permit issued, would meet the requirements of the Clean Water Act applicable to point source discharges. Therefore, assuming that Mobil will not discharge until they have obtained a permit, the project will not be in violation of the Clean Water Act, as amended.

EPA Comments. EPA has confirmed in its comments in earlier override appeals that an OCS facility operated in compliance with an NPDES permit would satisfy the requirements of the CWA. *See, e.g.*, Korea Drilling

Decision at 10. Conversely, a project not operating in compliance with the terms of an NPDES permit would not meet the requirements of the CWA applicable to point source discharges.

In spite of Mobil's statements to the contrary,[59] Mobil cannot lawfully conduct its proposed activity without meeting the terms and conditions of an NPDES permit, thus meeting the standards of the Clean Water Act. Therefore, I find that Mobil's proposed activity will not violate the requirements of the Clean Water Act.

b. *Clean Air Act*

Sections 108 and 109 of the Clean Air Act, as amended (CAA), 42 U.S.C. §§ 7408 and 7409, direct the EPA to prescribe national ambient air quality standards (NAAQS) for air pollutants to protect the public health and welfare. Pursuant to CAA § 110, 42 U.S.C. § 7410, each state in turn is required to develop and enforce an implementation and enforcement plan for attaining and maintaining the NAAQS for the air mass located over the state.

Mobil states that due to the distance of the drill site from the nearest land, the onshore effects of drilling emissions are negligible, and that emissions from both the onshore and offshore facilities are estimated in accordance with EPA standards and guidelines.[60] Mobil's Initial Brief at 56. The State has commented that since Clean Air Act

[59] Mobil has stated that the proposed cadmium and mercury limits would present serious compliance problems, and that these limits cannot be consistently achieved. *See* Mobil Exhibit 18 at 58.

[60] 30 C.F.R. § 250.33(a). Total estimated emissions from both the onshore and offshore facilities fall below the calculated regulatory exemption levels set forth in 30 C.F.R. § 250.45. Mobil's POE, vol. 1 at B19-1 - B19-6.

issues have not been previously raised by the State, the Secretary's attention should be focussed on whether Mobil's proposed POE will not violate the Clean Water Act. State's Initial Brief at 81. In its comments on this appeal, EPA states that "[b]ased on the available information, the activities associated with the proposed exploratory drilling do not indicate that there would be a violation of the Clean Air Act."[61] Based upon a review of the record, I find that Mobil's proposed POE will not violate the CAA.

4. *Element 4: No Reasonable, Consistent Alternatives Available*

To meet the requirements of Element 4 of Ground I, I must find that "[t]here is no reasonable alternative available (*e.g.*, location, design, etc.) which would permit the activity to be conducted in a manner consistent with the [state's coastal] management program." 15 C.F.R. § 930.121(d). For state objections based on 15 C.F.R. § 930.64(b), the fourth Element of Ground I is usually decided by evaluating the alternative(s) proposed by a state in the consistency objection. *See* Chevron Decision at 58; LILCO Decision at 16. In this case, however, the State's objection to Mobil's proposed POE is based on a lack of information necessary to determine the consistency of the activity. *See* 15 C.F.R. §§ 930.64(d), 930.79(c).

I find that there is no reasonable, available alternative to Mobil's proposed POE which would permit Mobil to conduct the activity in a manner consistent with the State's coastal management program.

[61] Letter from Richard E. Sanderson, Director, Office of Federal Activities, Environmental Protection Agency, to Hon. Gray Castle, Deputy Under Secretary for Oceans and Atmosphere, Department of Commerce, July 11, 1991 (EPA Comments).

In terms of alternatives, § 930.64(d) imposes different requirements upon a state than does § 930.64(b)(2). Under § 930.64(d) "the objection must describe the nature of the information requested and the necessity of having such information to determine the consistency of the activity with the management program." Unlike § 930.64(b)(2), § 930.64(d) does *not* require a state to describe in its objection "alternative measures (if they exist) which, if adopted by the applicant, would permit the proposed activity to be conducted in a manner consistent with the management program." If a state lacks information necessary to assess a proposed activity, it would likely lack information necessary to assess possible alternatives to an activity.

Nevertheless, in this case the State indicated in its objection letter that the only alternative available is for Mobil to "provide the information needs identified necessary to adequately assess consistency with the NCCMP." State Objection Letter. The State identified informational deficiencies in addition to those identified in the State's NPDES objection letter. The State continued: "Should Mobil provide the required information, including relevant information needs identified by the Outer Banks Protection Act Review Panel, the State will then be in a position to review the proposed activity to determine whether it may be conducted in a manner consistent with North Carolina's Coastal Management Program." State Objection Letter. Since the information is allegedly necessary to a consistency determination, however, the State cannot determine the probable consistency of the activity prior to the submission of the information by Mobil. I find that the State's suggested alternative of providing the information identified by the State is not a reasonable alternative available which would permit the activity to be conducted

in a manner consistent with the State's coastal management program because there is no indication by the State of the probable consistency of Mobil's proposed activity upon submission of the additional information. *See also* Chevron Decision at 51.

In reviewing the record of this appeal, I have identified two possible alternatives that may be reasonable and available. First, in its briefing for the appeal the State argues that a no-discharge NPDES permit is a reasonable alternative that could allow exploratory drilling to go forward while additional information is gathered through monitoring studies. State's Initial Brief at 86. In Mobil's NPDES appeal for this project, the State asserted, however, that the consistency of this alternative would depend on identification of a suitable disposal site. State's Initial NPDES Brief at 39. In this appeal the State offers no further assurances of the probable consistency of this alternative. *See* State's Initial Brief at 86-89. The barging proposal therefore fails to qualify as an alternative because the State does not indicate whether barging would probably be consistent with the State's CMP since the proposal's consistency is dependent upon identification of a suitable disposal site.[62] Second, the State makes a reference in its initial NPDES brief to possible relocation of Mobil's drilling site. State's Initial NPDES Brief at 39. The State claims, however, that "without additional information on the biological resources located in other potential discharge areas, acceptable alternative sites cannot presently be properly evaluated." State's Initial NPDES Brief at 39. The possible relocation of Mobil's drilling site fails to qualify as an alternative for two reasons. First, the

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[62] The barging alternative would also not address the State's separately-identified concerns regarding Mobil's proposed oil spill contingency plan.

description is too general in nature since the State did not identify the location of an alternative site. *See* Texaco Decision at 36; Korea Drilling Decision at 24. Second, the State does not indicate whether an alternative site would probably allow Mobil to conduct drilling discharges consistent with the State's CMP.

The record for this appeal discloses no reasonable, available alternatives. If such alternatives existed, the State would likely offer them even though not required to do so for objections made pursuant to 15 C.F.R. § 930.64(d). Element 4 requires that alternatives be consistent with state CMPs, and a state is in the best position to evaluate the consistency of a possible alternative. Therefore, based on the record before me, I find that there is no reasonable, available alternative to Mobil's proposed POE which would permit Mobil to conduct the activity in a manner consistent with the State's coastal management program.

Conclusion for Ground I

Based on the findings above, I find that Mobil has not satisfied Element 2 of Ground I. Therefore, the activities described in detail in Mobil's proposed POE are not consistent with the objectives or purposes of the CZMA.

B. *Ground II: Necessary in the Interest of National Security*

I conclude that the proposed activity is not necessary in the interest of national security.

The second statutory ground for an override of a state's objection to a proposed activity is based on a finding that an activity is necessary in the interest of national security. To make this determination I must find that "a national defense or other national security interest would be significantly impaired if the activity were not permitted to go forward as proposed." 15 C.F.R. § 930.122.

Mobil asserts that decreased reliance on oil imports contributes to the national defense and national security and that exploration is a necessary step in the development of new domestic reserves. Additionally, Mobil contends that there are few large oil and gas reserves to be found,[63] and that the size of the potential natural gas reserve in this area would make its exploration important for national security reasons. Mobil's Final Brief at 57.

In order to decide this ground, I will give considerable weight to the views of the Department of Defense (DOD) and other Federal agencies. 15 C.F.R. § 930.122. In soliciting the views of several Federal agencies, the Deputy Under Secretary asked those agencies to identify any national defense or other national security objectives directly supported by Mobil's proposed POE, and to indicate which of the identified national defense or other national security interests would be significantly impaired if Mobil's activity were not allowed to go forward as proposed.

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[63] I agree with Mobil that our nation's security interests are not static. *See* Mobil's Initial Brief at 88. I note, however, that our nation's concern for energy independence from foreign sources of oil has been longstanding, as exemplified by President Nixon's announcement on November 7, 1973, of "Project Independence." *See* 9 Compilation of Presidential Documents 1309 (1973), *cited in State of Alaska v. Andrus*, 580 F.2d 465, 467 n.1 (D.C. Cir.), *vacated in part sub nom, Western Oil & Gas Assoc. v. State of Alaska*, 439 U.S. 922 (1978). Moreover, the Secretary has previously held that the size of oil and gas reserves is not determinative of whether the requirements of this ground are met. The degree of importance the Secretary assigns the size of oil and gas reserves in deciding whether interests are significantly impaired depends on the facts of the case. Chevron Decision at 71.

The DOD responded by stating that it saw no direct linkage under Ground II between Mobil's POE and any immediate national security needs.[64] The DOD did recognize, however, long-term national security benefits to be gained from the development of domestic energy sources. *Id.* I interpret DOD's comments to mean that in the opinion of DOD, national security interests would not be significantly impaired if the project were not allowed to go forward as proposed.

Other Federal agencies also support the general proposition that OCS exploration contributes to national security interests. The DOE stated that "[p]roducible oil and gas reserves in the Atlantic Outer Continental Shelf (OCS) can help this country replace imports, thereby meeting both energy and economic security and national defense goals. However, when environmentally benign exploitation such as that proposed by Mobil is blocked, this option is lost." DOE Comments. The DOE continues:

> Neither our domestic nor foreign policy should be subject to the availability of imported oil especially when the opportunity exists to develop domestic natural gas resources that can replace important [sic] oil. Consequently, we believe that this project is necessary in the interest of national security.

Id. The NSC stated that it is in the national security interest to increase domestic oil production where such production is economic and consistent with environmental procedures.[65] The Department of the Treasury recognizes

[64] Letter from F.S. Sterns, Deputy Assistant Secretary, Department of the Navy, to Margo E. Jackson, Assistant General Counsel for Ocean Services, NOAA, June 27, 1991, responding on behalf of the Secretary of Defense.

[65] Memorandum from William F. Sittmann, Executive Secretary, National Security Council, to Thomas Collamore, Chief of Staff and Assistant Secretary, Department of Commerce, April 3, 1991.

significant benefits to national security from domestic energy resources.[66] The DOI states that there is a direct relationship between national security and the success of the Federal program to develop offshore energy resources. DOI Comments. I find that none of these comments specifically address how these interests would be "significantly impaired" if Mobil's proposed POE is not allowed to proceed "as proposed."

MMS commented, however, that

> Denial of a Department of Commerce override of the State's consistency determination could well, in the extant case, deprive this Nation of a secure and environmentally sound source of as much as 5 tcf of natural gas from the Manteo Prospect. This amount of gas is the energy equivalent of approximately 1 billion bbl of crude oil and represents a major step in the direction of domestic energy security. As the recent events in the Persian Gulf clearly indicate, this Nation's domestic energy security, or rather the present lack thereof, significantly compromises national defense and national security.

MMS Comments at 42. I decline to give much weight to MMS' comment on significant impairment, however, because its comment appears to be based on speculation that denial of Mobil's POE could well foreclose any possibility of future oil and gas exploration of the Manteo Prospect. Denial of Mobil's proposed one-well exploration plan for Manteo Area Block 467 would not preclude the submission of other plans of exploration for the Manteo

[66] Letter from Maynard S. Comiez, Director, Office of Policy Analysis, Department of the Treasury, to Gray Castle, Deputy Under Secretary for Oceans and Atmosphere, Department of Commerce, April 8, 1991.

Prospect, an area which includes approximately 21 lease blocks.

Conclusion for Ground II

I find that the comments of the Federal agencies fail to persuade me that a national defense or other national security interest would be significantly impaired if Mobil were not permitted to explore Manteo Area Block 467 as proposed. Therefore, based on the record before me, I now find that the requirements for Ground II have not been met.

V. CONCLUSION AND SECRETARIAL DECISION

I have found that Mobil's Proposed POE is neither consistent with the objectives of the CZMA nor necessary in the interests of national security. Accordingly, I decline to override North Carolina's objection to Mobil's proposed POE.

/s/ David Barr
for Ronald H. Brown
Secretary of Commerce

September 2, 1994

DECISION AND FINDINGS

IN THE

DRILLING DISCHARGE

CONSISTENCY APPEAL OF

MOBIL OIL EXPLORATION &

PRODUCING SOUTHEAST, INC.

FROM AN OBJECTION BY THE

STATE OF NORTH CAROLINA

SEPTEMBER 2, 1994

DECISION

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Executive Summary

Introduction

Mobil Oil Exploration & Producing Southeast, Inc. (Mobil) has requested the Secetary of Commerce to override the State of North Carolina's (State's) objection to its proposal to discharge drilling wastes associated with Mobil's planned exploration of the outer continental shelf (OCS). Mobil proposes to drill an exploratory well in OCS Manteo Area Block 467 in order to evaluate its hydrocarbon potential. As explained in more detail below, the Secretary declines to override North Carolina's objection.

Mobil has also filed a separate appeal from the State's objection to its proposed Plan of Exploration at the drill site. A Secretarial decision in that appeal is being issued concurrently with the decision in this appeal. In that companion decision, the Secretary also declines to override North Carolina's objection to Mobil's proposed exploration of Manteo Area Block 467. Accordingly, North Carolina's objection under the CZMA prevents any federal agency from granting necessary permits for Mobil's proposed discharge of drilling wastes or Mobil's proposed Plan of Exploration.

Mobil's appeal arises under the Coastal Zone Management Act (CZMA), an act administered by the National Oceanic and Atmospheric Administration (NOAA), an agency within the Department of Commerce. Section 307 of the CZMA provides that any applicant for a required federal license or permit to conduct an activity affecting any land or water use or natural resource of the coastal zone, shall provide to the permitting agency a certification that the proposed activity complies with the enforceable policies of a state's coastal management program.

Mobil has requested a permit from the U.S. Environmental Protection Agency (EPA) for its proposed discharge of drilling wastes. Because North Carolina has objected to the project, EPA may not grant a permit for the activity, unless the Secretary of Commerce finds that the activity is consistent with the objectives of the CZMA or is otherwise necessary in the interest of national security.

Background

About 39 miles off North Carolina's coast lies OCS Lease A-0236, also known as Manteo Area Block 467, for which Mobil is the operator. Mobil proposes to drill one exploratory well in search of natural gas at this site, discharge drilling wastes in accordance with a National Pollutant Discharge Elimination System (NPDES) permit, and conduct support activities primarily out of Morehead City, North Carolina. Mobil's proposed drilling site is located near "The Point," a biologically unique area defined by the convergence of the Gulf Stream, slope, and shelf waters, containing significant natural resources. Moreover, fish resources found near The Point are harvested by North Carolina fishermen. Mobil applied to the EPA for an NPDES permit, and certified that the drilling discharges covered by the permit were consistent with North Carolina's coastal management program.

In part because a significant food source would be exposed to Mobil's proposed wastes, on July 17, 1990, the State objected to Mobil's proposed discharge activities on the basis of a lack of necessary site-specific data and information. Specifically, the State contends that there is insufficient information to make a consistency determination on the impacts arising from Mobil's activity, without the completion of a four-part fisheries study. The State also

identified informational concerns relating to other coastal resources potentially affected by Mobil's proposed activity.

Under § 307(c)(3)(A) of the CZMA, 16 U.S.C. § 1456 (c)(3)(A), and the implementing regulations, the State's consistency objection precludes EPA from issuing the NPDES permit unless the Secretary finds that the activity is either consistent with the objectives or purposes of the CZMA (Ground I), or otherwise necessary in the interests of national security (Ground II).

In accordance with CZMA § 307(c)(3)(A) and 15 C.F.R. Part 930, Subpart H, Mobil filed with the Secretary an appeal from the State's objection to Mobil's consistency certification for the proposed NPDES permit activities. Mobil appealed pursuant to Ground I and Ground II. Additionally, three threshold issues were raised during the course of the appeal.

Threshold Issues

Upon consideration of the information submitted by Mobil, the State, the public, and several Federal agencies, the Secretary made the following findings on the threshold issues:

A. *Request for a Dismissal*

The State requested that the Secretary dismiss the appeal for good cause, arguing that Mobil failed to provide data and information necessary to the Ground I and Ground II tests, and that Mobil failed to base its appeal on its proposed discharge activity. The Secretary declined to dismiss Mobil's appeal for good cause. The Secretary found that in this case if there is insufficient data and information in the record to make the findings necessary for an override, rather than dismiss the appeal as the State has

requested, the Secretary will issue a decision which will reflect an inability to make these findings. The Secretary also found that Mobil has based arguments for the two grounds for a Secretarial override on its proposed drilling discharges.

B. *Burden of Proof and Adequacy of Information*

The parties raised an issue as to the burden of proof and the adequacy of information. The State argued that Mobil has failed to provide adequate information to assess the impacts of its proposed activity, let alone prove that the grounds for an override have been met. Mobil asserted that the State failed to establish any impact of Mobil's proposed discharges on North Carolina's coastal resources. The Secretary found that the burden is on Mobil to prove the grounds for an override of the State's objection, and that in examining the information in the record of the appeal, the Secretary will necessarily determine the adequacy of information.

C. *Scope of the Activity*

The parties raised an issue as to the scope of the activity under consideration in this appeal. The activity at issue is Mobil's proposed discharges of drilling wastes. Mobil's proposed plan of exploration for Manteo Area Block 467 is not the subject of this appeal. However, since Mobil's proposed discharges are a part of Mobil's proposed exploration, there will be some overlap of issues making Mobil's plan of exploration relevant to the grounds for reviewing this appeal.

D. *Conclusions Regarding Threshold Issues*

The Secretary determined that threshold issues raised by Mobil and the State of North Carolina did not preclude him from considering the merits of this case.

Ground I: Consistent with the Objectives or Purposes of the CZMA

To find that the proposed activity satisfies Ground I, the Secretary must determine that the project satisfies all four of the elements specified in the regulations implementing the CZMA (15 C.F.R. § 930.121). If the project fails to satisfy any one of the four elements, it is not consistent with the objectives or purposes of the CZMA and federal licenses or permits may not be granted. The four elements of Ground I are:

1. The proposed activity promotes one or more of the competing national objectives or purposes contained in the CZMA.

2. The proposed activity's individual and cumulative adverse effects on the coastal zone are outweighed by its contribution to the national interest.

3. The proposed activity will not violate any requirements of the Clean Water Act or the Clean Air Act.

4. There is no reasonable alternative available that would allow Mobil to discharge its drilling wastes in a manner consistent with the State's coastal management program.

The Secretary made the following findings with regard to Ground I:

1. Mobil's proposed discharge activity furthers the exploration of offshore gas resources, and thus, in-

directly furthers one of the objectives or purposes of the CZMA.

2. The information in the record is inadequate to determine whether the national interest benefits of Mobil's proposed activity outweigh the proposed activity's adverse effects on the State's coastal resources and uses.

3. Mobil's proposed discharge activity will not violate the Clean Air Act, as amended, or the Federal Water Pollution Control Act, as amended.

4. There is no reasonable alternative available to Mobil that would allow its proposed discharge activity to be carried out in a manner consistent with the State's coastal management program.

Ground II: Necessary in the Interest of National Security

There will be no significant impairment to a national defense or other national security interest if Mobil's proposed discharge activity is not allowed to go forward as proposed.

Conclusion

Because Mobil's proposed discharge activity does not meet the requirements of either Ground I or Ground II, the activity may not proceed as proposed.

LIST OF ABBREVIATIONS AND DEFINED TERMS

CAA—Clean Air Act
CMP—Coastal Management Program
COE—Corps of Engineers
CSA—Continental Shelf Associates, Inc.
CWA—Clean Water Act
CZMA—Coastal Zone Management Act
DEM—Division of Environmental Management
DER—Draft Environmental Report
DOD—Department of Defense
EA—Environmental Assessment
EPA—Environmental Protection Agency
ESRP—Environmental Sciences Review Panel
DOE—Department of Energy
DOI—Department of the Interior
FER—Final Environmental Report
FWS—Fish and Wildlife Service
MMS—Minerals Management Service
MOEPSI—Mobil Exploration & Producing Southeast, Inc.
NAAQS—National Ambient Air Quality Standards
NCDMF—North Carolina Division of Marine Fisheries
NMFS—National Marine Fisheries Service
NOAA—National Oceanic and Atmospheric Administration
NPDES—National Pollutant Discharge Elimination System
NRC—National Research Council
NSC—National Security Council
OCRM—Office of Ocean and Coastal Resource Management
OCS—Outer Continental Shelf
OOC—Offshore Operators Committee
State—State of North Carolina

DECISION

I. FACTUAL BACKGROUND

In Federal waters, about 39 miles off North Carolina's coast, lies Outer Continental Shelf (OCS) Lease OCS A-0236, also known as Manteo Area Block 467. *See* Figure 1. This area was leased in September 1981 by Mobil [1] and its partners in OCS Lease Sale 56, and is a frontier area for oil and gas exploration. Mobil is the operator of the lease. Mobil's Statement in Support of a Secretarial Override (Mobil's Initial Brief), at 2-3. The lease block lies at the crest of a buried reef complex which runs in a general north-south direction along the edge of the Mid-Atlantic OCS.[2] Mobil's Initial Brief at 7.

The activity at issue in this case is the proposed marine discharge of drilling wastes by Mobil as described in its application for a National Pollutant Discharge Elimination System (NPDES) permit [3] for Lease OCS A-0236. Mobil

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[1] Mobil Oil Exploration & Producing Southeast, Inc., a subsidiary of Mobil Exploration & Producing U.S. Inc., is the proposed operator. For the purposes of description in this decision, both entities will be referred to as "Mobil."

[2] The Minerals Management Service (MMS) estimates that there is a 90 percent chance that no hydrocarbons will be discovered in the area of which Block 467 is a part. If a discovery is made, however, the discovery is likely to be gas rather than oil, based on geochemical analyses of previous wells drilled on the Atlantic OCS. Final Environmental Report on Proposed Exploratory Drilling Offshore North Carolina, MMS, August 1990, (FER), at III-5. The potential size of a discovery could be more than five trillian cubic feet of natural gas. Letter from David C. O'Neal, Assistant Secretary, Land and Minerals Management, Department of the Interior, to Gray Castle, Deputy Under Secretary for Oceans and Atmosphere, Department of Commerce, January 22, 1991. If such a discovery is made, the MMS estimates that approximately 103 wells would be required to recover this amount of gas. FER at IV-13.

[3] *See* Federal Water Pollution Control Act § 402(a), 33 U.S.C. § 1342(a).

submitted its application for an NPDES permit to the U.S. Environmental Protection Agency (EPA) on August 18, 1989. A delay of several months ensued.[4] Finally, on April 17, 1990, Mobil certified that the drilling discharges covered by the permit were consistent with North Carolina's Coastal Management Program (CMP). Mobil proposes to drill one exploratory well in a water depth of 2,690 feet and estimates the drilling schedule to be approximately 114 days, sometime between May and October. Mobil's Initial Brief at 8-9. Mobil will support the drilling operation with a facility in Morehead City, North Carolina. Mobil's Initial Brief at 9. The proposed drilling site is located, however, near an area known as "The Point."

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4 On October 11, 1989, the National Oceanic and Atmospheric Administration's (NOAA's) Office of Ocean and Coastal Resource Management (OCRM) granted the State of North Carolina's (State's) request to review Mobil's proposed discharges for consistency. Letter from Donald E. Critchfield, Acting Director, OCRM, NOAA, to George T. Everett, Director, Department of Natural Resources and Community Development, North Carolina Division of Coastal Management, October 11, 1989. Mobil then withdrew a prior consistency certification. Letter from James C. Martin, Manager, Environmental, Regulatory & Loss Prevention North America, Mobil, to George T. Everett, November 16, 1989. On January 5, 1990, the State renewed its request that Mobil withdraw its NPDES permit application due to the State's informational concerns. Letter from George T. Everett to James C. Martin, January 5, 1990. On February 2, 1990, the State requested a determination from NOAA that the State would not lose its consistency objection rights by waiting beyond the February 21, 1990 deadline. Letter from I. Clark Wright, Jr., North Carolina Associate Attorney General, to Margo E. Jackson, Attorney, NOAA, February 2, 1990. On February 9, 1990, NOAA informed the State that a presumption of concurrence would not occur. Letter from Margo E. Jackson, Acting Assistant General Counsel for Ocean Services, NOAA, to I. Clark Wright, Jr., February 9, 1990.

[Figure 1 Map Omitted in Printing]

The Point is an area characterized by unique physical and biological qualities. Physically, The Point is a mobile, transitional ocean area defined by the convergence of the Gulf Stream, continental slope, and shelf waters. The Point is not a fixed location, rather its position fluctuates with changes in the location of the western boundary of the Gulf Stream. Water mass convergences at The Point concentrate nutrients, plankton and floating materials near the sea surface, resulting in weedlines. Biologically, The Point is a highly productive and ecologically unique area essential to the State's coastal zone. Fish resources found near The Point such as yellowfin, bluefin, blackfin, and bigeye tuna, white and blue marlin, sailfish, swordfish, wahoo, and dolphin are harvested by North Carolina fishermen. Scientists view the area as one of anomalously high biomass for the continental slope.[5] In addition to the significant fishery resources and the unusually abundant benthic community, marine bird populations are extensive, and turtles, whales and dolphins have regularly been observed at the site. *Id.* Many species of turtles, birds and mammals that frequent The Point are endangered and vulnerable to adverse environmental effects. The National Marine Fisheries Service (NMFS) has identified the area as extremely important to NMFS and NOAA trust resources. Memorandum from William W. Fox, Jr., Director, NMFS, to Margo Jackson, Assistant General Counsel for Ocean Services, November 27, 1990 (NMFS Comments).

While drilling its exploratory well, Mobil proposes to discharge much of its wastes into the Atlantic Ocean. Mobil's wastes will include drill cuttings, drilling fluids,

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5 Testimony of Dr. Alan Hulbert before the Committee on Interior and Insular Affairs (Mobil Exhibit 28).

and other wastes, such as deck drainage and sanitary wastes. The chemical composition of Mobil's wastes will likely include hydrocarbons, paraformaldehyde, and metals such as barium, cadmium, mercury and lead. Mobil states that compliance with the proposed cadmium and mercury limits cannot be consistently achieved because of varying concentrations of barite in drilling fluids and because of metal contributions from the formation into which it will be drilling.[6] Some wastes will be shunted at least 25 feet below the surface of the water. Other wastes will be discharged near the seafloor.

In part because a significant food source would be exposed to Mobil's proposed wastes, on July 17, 1990, the State of North Carolina (State) objected to Mobil's proposed discharge activity on the basis of a lack of necessary site-specific data and information.[7] *See* 15 C.F.R. § 930.64(d). Specifically, the State contends that there is insufficient information to make a consistency determination on the impacts arising from Mobil's activity, without the completion of a four-part fisheries study.[8] State Objecton Letter. The State claims that the information is

[6] Mobil's Comments and Responses to Issues of Concern for Draft NPDES Permit for Manteo Block 467 Exploratory Well Discharges (Mobil Exhibit 18), May 1990, at 58.

[7] *See* Letter from Roger N. Schecter, Director, North Carolina Division of Coastal Management, to William C. Whittemore, Senior Counsel, Mobil, July 17, 1990 (State Objection Letter).

[8] The first portion of the proposed study is an investigation of larval and juvenile abundance and distribution in the vicinity of the Mobil project. The second part of the State's proposal is to gather additional information centered on the *Sargassum* community known to occur in the area of the proposed activity. The third portion of the proposed study is to measure the effects of drilling waste deposition on bottom organisms. The fourth section of the State's proposal is documentation of the commercial and recreational fishing in the vicinity of the drill site and The Point.

necessary to determine the biological importance of the proposed drill site area to the State's fisheries, the importance of the area to marine resources, and the economic importance of the proposed drill site area to the State's fishermen. *Id.* In addition to explaining the basis of its objection the State notified Mobil of its right to appeal the State's decision to the Department of Commerce (Department) as provided under § 307(c)(3)(A) of the Coastal Zone Management Act, as amended (CZMA), 16 U.S.C. § 1456(C)(3)(A), and the implementing regulations, 15 C.F.R. Part 930, Subpart H.

Pursuant to CZMA § 307(c)(3)(A) and 15 C.F.R. §930.131, the State's consistency objection precludes EPA from issuing the NPDES permit unless the Secretary of Commerce (Secretary) finds that the activity, notwithstanding the State's objection, is either consistent with the objectives or purposes of the CZMA (Ground I), or otherwise necessary in the interests of national security (Ground II).[9]

II. APPEAL TO THE SECRETARY OF COMMERCE

On July 31, 1990, in accordance with CZMA § 307(c)(3)(A) and 15 C.F.R. Part 930, Subpart H, Mobil filed with this Department a notice of appeal from the State's objection to Mobil's consistency certification for the proposed NPDES permit activities.[10] Mobil's notice of appeal

[9] There are references in the record to the Deputy Secretary as the decisionmaker in this case because on May 19, 1989, then Secretary of Commerce Robert Mosbacher recused himself from issuing decisions in appeals involving oil and gas issues and delegated that authority to the Deputy Secretary. I have not recused myself from issuing this decision.

[10] Letter from William C. Whittemore, Senior Counsel, Mobil, to Hon. Robert A. Mosbacher, Secretary of Commerce, July 27, 1990 (notice of appeal).

requested an extension of time to submit its full supporting statement, data and other information. By letter of September 25, 1990, the Department set an initial briefing schedule for the parties.[11] Mobil perfected its appeal by filing a brief with supporting information and data on September 27, 1990. The State filed an initial brief with the Department on November 23, 1990.

Mobil has also filed a separate appeal from the State's objection to its proposed Plan of Exploration (POE) at the drill site. A Secretarial decision in that appeal is being issued concurrently with the decision in this appeal.[12]

The administrative record of this appeal also contains comments submitted by the public and Federal agencies. By way of notices in the *Federal Register* and local newspapers,[13] the Department requested public comments and announced the date of a public hearing.[14] Public com-

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11 Mobil's initial brief was due on September 28, 1990, and the State's initial brief was due on November 12, 1990. The State's initial briefing deadline was extended to November 21, 1990.

12 Since Mobil's NPDES permit appeal and POE appeal for the Manteo Area Block 467 drill site have not been consolidated, they contain distinct administrative records upon which I will base my decisions in the two appeals. However, much of the information concerning Mobil's activities is common to the record of the two appeals. I also note that much of the discussion of issues is similar in the decision documents for these two appeals.

13 *See* 55 *Fed. Reg.* 45629 (October 30, 1990), and notices in the *Coastland Times* (October 23, 25, 28, 1990) and the *Virginian Pilot* (November 5, 6, 7, 1990).

14 On August 23, 1990, pursuant to 15 C.F.R. § 930.129, the State requested that the Secretary hold a public hearing concerning the issues raised in Mobil's appeal. Letter from Robin W. Smith, North Carolina Assistant Attorney General, to Margo Jackson, Assistant General Counsel, NOAA, August 23, 1990. On September 13, 1990, the Department granted the State's public hearing request. Letter from Thomas A. Campbell, General Counsel, NOAA, to Robin W. Smith, North Carolina Assistant Attorney General, September 13, 1990.

ments were received and incorporated as part of the record of this appeal. The Department held a public hearing on December 13, 1990, in Manteo, North Carolina, addressing issues raised in the appeal. Oral and written comments were received from Mobil, the State, local public officials, the public and various interest groups. On December 27, 1990, the record closed for public comments. The Department also solicited the views of fourteen Federal agencies,[15] and the National Security Council (NSC) regarding the two grounds for a Secretarial override of the State's objection. With the exception of the Department of State, all of the agencies and the NSC responded with comments.

As with other aspects of this appeal, the final briefing schedule and the closure of the administrative record were the subject of discussion between Mobil and the State. The parties concurrently filed their final briefs on June 18, 1991.[16] The administrative record of the appeal was reopened on April 29, 1992, to accept a report from the Environmental Sciences Review Panel (ESRP),[17] entitled

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15 Comments were solicited from the Department of Defense, Department of the Treasury, Department of State, Department of Transportation, Department of Energy, Department of the Interior, Fish and Wildlife Service, National Park Service, Minerals Management Service, Environmental Protection Agency, Federal Energy Regulatory Commission, National Marine Fisheries Service, Army Corps of Engineers and the Coast Guard.

16 Mobil's Final Statement in Support of a Secretarial Override, June 17, 1991 (Mobil's Final Brief); North Carolina's Response to the Secretary's Final Briefing Request, June 17, 1991 (State's Final Brief).

17 The ESRP was created under § 6003 of the Oil Pollution Act of 1990, 33 U.S.C. § 2753, to assess whether the available physical oceanographic, ecological and socioeconomic information relating to the North Carolina OCS was adequate to enable the Secretary of the Interior to carry out his responsibilities under the Outer Continental Shelf Lands Act. The Department determined that

Report to the Secretary of the Interior from the North Carolina Environmental Sciences Review Panel as Mandated by the Oil Pollution Act of 1990, January 22, 1990 (ESRP Report). Finally, Mobil and the State were provided an opportunity to file responses to any issues raised by the ESRP Report.

Although all materials received have been included in the record, I have considered them only as they are within my scope of review. After examining the State's objection, I have determined that the State has complied with the requirements of the CZMA and its implementing regulations for properly lodging an objection.[18] *See* CZMA § 307(c)(3)(A); 15 C.F.R. §§ 930.64(a), (d). Based on all relevant information in the administrative record, I will now examine threshold issues raised in the appeal prior to my determination of whether the grounds for a Secretarial override have been satisfied.[19]

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while the purpose of the ESRP report differs from the purpose of this appeal, its findings may be relevant to the issues raised in this appeal. Letters from Gray Castle, Deputy Under Secretary, Department of Commerce, to William C. Whittemore, Senior Counsel, Mobil, and Roger N. Schecter, Director, North Carolina Division of Coastal Management, February 25, 1991.

18 *See* Decision and Findings in the Consistency Appeal of Shickrey Anton, (Anton Decision), May 21, 1991, at 3; Decision and Findings in the Consistency Appeal of Chevron U.S.A., Inc., (Chevron Decision), October 29, 1990, at 5.

19 Both Mobil and the State have raised the issue of bias. Mobil asserts that the State's consistency position is tainted. Mobil's Final Brief at 5. The State asserts that the MMS has an energy production bias. State's Final Brief at 13, 34. I will accord, however, what I determine to be the appropriate weight to comments received in this appeal.

III. THRESHOLD ISSUES

A. *Request for a Dismissal*

The State has requested that I dismiss the appeal for good cause. *See* 15 C.F.R. § 930.128. The State argues: "Good cause exists in that . . . [Mobil] has failed to provide data and information to the Secretary's proper determination of the issues raised in the Ground I and Ground II tests." North Carolina's Response to the Secretary's Briefing Request and to Mobil's Statement of Reasons and Brief, November 21, 1990, (State's Initial Brief), at vi. The State also argues that dismissal is also appropriate under 15 C.F.R. § 930.128(d) because Mobil has "failed to base its appeal on Ground I or Ground II as applied to the proposed activity." State's Initial Brief at vi. The State asserts that Mobil's argument for a Secretarial override is based on its overall drilling activities rather than on its proposed discharge of drilling wastes into the Atlantic Ocean. *See* State's Initial Brief at vi-vii.

The regulations at 15 C.F.R. § 930.128 provide a non-inclusive list of good causes that are grounds for dismissal. Good cause includes "[f]ailure of the appellant to base the appeal on grounds that the proposed activity either (1) is consistent with the objectives or purposes of the [CZMA] or (2) is necessary in the interest of national security." 15 C.F.R. § 930.128(d).

Based upon a review of the record of this appeal, I decline to dismiss Mobil's appeal for good cause. First, as I will discuss in the section on burden of proof, in this case if I determine that there is insufficient data and information in the record for me to make the findings necessary for an override, rather than dismiss the appeal as the State has requested, I will issue a decision which will reflect my inability to make these findings. Second, I decline to dismiss the appeal based on § 930.128(d).

Rather, I find that there is sufficient evidence that Mobil has also based its arguments on the two grounds for a Secretarial override as applied to the proposed activity. Therefore, I decline to dismiss the appeal as requested by the State.

B. *Burden of Proof and Adequacy of Information*

The parties have raised an issue as to the burden of proof and the adequacy of information in this appeal. The State argues that Mobil has failed to provide adequate information to assess the impacts of its proposed activity, let alone prove that the grounds for an override have been met. On the other hand, Mobil asserts that the State has failed to establish any "real impact of these distant offshore discharges on North Carolina's coastal resources." Mobil's Final Brief at 1. Mobil also argues that there is adequate information on the affects of the proposed drilling discharges, and that any effects are minor. *See* Mobil's Initial Brief at 26.

Aside from the requirements imposed on the State for properly lodging an objection, the Appellant bears the burden of proof and the burden of persuasion. *See* Anton Decision at 4; Chevron Decision at 4-5. As stated in the Anton Decision:

> The regulations provide that the Secretary shall find that a proposed activity satisfies either of the two statutory grounds "when the information submitted *supports* this conclusion." 15 C.F.R. § 930.130(a) (emphasis added). Thus, without sufficient evidence the Secretary will decide in favor of the State.

Anton Decision at 4 (emphasis in original). Therefore, for me to find for Mobil I must make the findings specified in the regulations at 15 C.F.R. §§ 930.121 or 930.122.

An absence of adequate information in the record inures to the State's benefit because such an absence would prevent me from making the required findings.[20]

I will make my decision in this appeal based on the evidence in the record before me. The record contains much non-site-specific information as well as information collected for other purposes, raising the issue of the relevance of this information to this case. *C.f.* National Research Council, "Drilling Discharges in the Marine Environment" (1983) (NRC 1983 Report) at 6. I note this statement of the National Research Council (NRC):

> Marine ecosystems on the OCS clearly vary in their sensitivities to anthropogenic stress, and caution is therefore advisable in extrapolating observations from one region to another. On the other hand, to dismiss all research results not obtained directly from the environment analyzed may amount to ignoring valuable data.

NRC 1983 Report at 137. In evaluating the information in the record, I will necessarily determine the adequacy of the information for determining whether Mobil has satisfied the two grounds for a Secretarial override,[21] recog-

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[20] The State objection in the Decision and Findings in the Consistency Appeal of Long Island Lighting Company, (LILCO Decision), February 26, 1988, was based on lack of information. In that case, the Secretary found that the record contained sufficient information, in particular comments from Federal agencies, for him to make a finding that the Appellant's project would have no adverse effects on the natural resources of the state's coastal zone. *See* LILCO Decision at 12-13.

[21] The Secretarial override process is a separate and independent decision-making function from the State's consistency review process. *See* Anton Decision at 3; Chevron Decision at 5. Since the State's consistency review and the Secretarial override process are based on different evaluative criteria the adequacy of information

nizing that some information and conclusions contained in the record may not be directly applicable to the facts of this case.[22] The two parameters for adequacy which I will use are completeness of information and scientific quality of information.

In its 1989 report the NRC recognized that the quantity and types of ecological information needed generally varied with the stage of the overall project, with less site-specific information needed for leasing decisions, more site-specific information needed for exploration decisions, and still more information needed for a decision to develop and produce hydrocarbon resources. *See* National Research Council, "The Adequacy of Environmental Information for Outer Continental Shelf Oil and Gas Decisions: Florida and California" (1989) (NRC 1989 Report) at 42-43. Moreover, the NRC generally identified the information necessary for leasing, exploration, development and production decisions. *See* NRC 1989 Report at 43. I agree with the conclusions of the NRC on this point.[23] Therefore, I find that for me to adequately identify the impacts of the proposed project, the record should disclose, at a minimum, a characterization of the environment, an identification of the biological resources at risk, and an identification of basic ecological relationships. *See* NRC 1989 Report at 5.

The NRC provides further guidance, which I adopt in this case, as to the nature of the information necessary to

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for thse two determinations may differ. In addition, the administrative records for these two determinations may differ.

22 *See, e.g.*, Mobil's Supplemental Final Statement in Support of a Secretarial Overrride (Mobil's Supplemental Final Brief), May 28, 1992, at 5.

23 Mobil also agrees that the 1989 National Research Council Report provides important guidance. *See* Mobil's Initial Brief at 27.

make an informed decision. This necessary information would include (1) a characterization of major habitat types; (2) a catalog of representative species (or major species groups) present in the lease area; and (3) seasonal patterns of distribution and abundance. NRC 1989 Report at 43. Furthermore, in addition to this information which the NRC states is generally necessary to make an informed leasing decision, the record should generally disclose (1) basic ecological information (*e.g.*, habitat, feeding behavior and reproduction); (2) basic information on factors determining vulnerabiltiy of various species; and (3) information on the potential effects of various agents of impact. NRC 1989 Report at 43.

The adequacy of information will also depend on the likelihood[24] of an impact as well as on the potential extent or severity of an impact. *C.f.* Chevron Decision at 44; Decision and Findings in the Consistency Appeal of Exxon Company, U.S.A., (Exxon SRU Decision), November 14, 1984, at 15; NRC 1989 Report at 54, 59-60. As stated by the NRC, where unique habitats or endangered and rare species exist, more extensive characterization of the sensitivity of biota to OCS activities, recovery rates, and identification of mitigating measures may be required before leasing. NRC 1989 Report at 43. Generally, less information is necessary where the likelihood or the extent of impacts may be low, and more

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24 The North Carolina Environmental Sciences Review Panel states:

> Risk assessment clearly and appropriately requires application of probability theory to permit proper evaluation of proposed OCS activities, but the use of probability in determining standards of completeness of environmental information gathering should be largely limited to exclusion of exceedingly improbable events from extensive evaluation.

ESRP Report at 81.

information is necessary where the likelihood or the extent of impacts may be high.[25]

C. *Scope of the Activity*

The parties have raised an issue as to the scope of activity under consideration in this appeal. The sole effect of overriding a State objection is to authorize the Federal agency from whom the license or permit in question is sought to issue the license or permit notwithstanding the State's consistency objection. Decision and Findings in the Consistency Appeal of Korea Drilling Company, Ltd., (Korea Drilling Decision), January 19, 1989, at 4-5. The activity that the EPA is authorized to permit in this case is the one that the State reviewed, as modified by commitments by the Appellant during the course of this appeal. *See* Korea Drilling Decision at 5. Accordingly, the activity I am considering here on appeal consists of Mobil's proposed drilling discharges, as described in its NPDES permit application, and Mobil's statements during the course of the appeal, which I view as commitments, as to the inclusion of 19 additional measures to further protect the State's coastal resources, including in part:

- Pre-discharge dilution of drilling discharges with sea water in a 10:1 ratio;
- A maximum 30-barrel-per-hour discharge rate limitation for drilling fluids and cuttings once the riser has been set;

[25] The extent of the adverse effects will depend on several factors including the nature of the affected habitats and species, the toxicity of the discharges, the exposure concentration over time, the potential for bioaccumulation and the chemical/physical properties of the receiving waters. *See* Bowler and Petrazzuolo, *Draft Ocean Discharge Criteria Evaluation, NPDES Permit No. NC-0052523*, (Mobil Exhibit 27) at 10-1; NRC 1989 Report at 5.

- Collection of fish eggs and larvae in the drill site vicinity to monitor the effects of the drilling activity;
- Use of a static-sheen test in place of the normally-used visual sheen test for free oil in discharges;
- Placement of the rig cooling water intake 25 feet below sea surface to minimize possible entrainment of fish eggs and larvae;
- Sampling and photodocumentation to monitor the fate and effect of discharges on the benthos; and
- Collection of data regarding the presence of, and impacts from proposed activities on, marine mammals, sea turtles, and birds.

Mobil's Final Brief at 36-37; *see also* Letter from Bruce G. Weetman, Regional Director, Minerals Management Service, to Margo E. Jackson, Assistant General Counsel, NOAA, December 27, 1990 (MMS Comments) at 41-43. Mobil estimates that the waste volumes to be covered by the NPDES permit include: drilling fluids[26] (13,300 barrels), drill cuttings (2,775 bbl), sanitary wastes (176,700 gallons), and domestic wastes (885,000 gallons). Other discharges to be covered by this permit

[26] The five basic components of drilling fluids are barium sulfate, bentonite, lignosulfonate, lignite, and sodium hydroxide. Mobil's drilling fluids would be water-based. *See* Mobil Exhibit 27. In general, drilling fluids have also been found to contain small concentrations of metals such as arsenic, cadmium, chromium, copper, lead and mercury. *Id.* Mobil's proposed permit limits the cadmium and mercury content. *Id.* Acute toxicity tests of whole drilling fluids have generally produced low toxicity. *Id.* Toxicity varies with the organism and with the life cycle, with larval stages generally more sensitive. *Id.*

include deck drainage,[27] produced water,[28] produced sand and other wastes.

I will also consider the cumulative effects of Mobil's activity, and so I will consider the adverse effects of other reasonably foreseeable activities. In particular, I find that Mobil's activities described in detail in its proposed POE are reasonably foreseeable and will be relevant to my consideration of cumulative effects in this case. I note, however, that since the consistency of NPDES permit activities is an issue distinct from the consistency of plan of exploration activities,[29] Mobil has filed a separate appeal to the State's objection to its proposed POE.

IV. GROUNDS FOR OVERRIDING A STATE OBJECTION

Pursuant to CZMA § 307(c)(3)(A) and 15 C.F.R. § 930.131, Federal licenses or permits required for a proposed activity may be granted despite a consistency objection if I find that the activity is (1) consistent with the objectives or purposes of the CZMA (Ground I), or (2) otherwise necessary in the interest of national security (Ground II). *See also* 15 C.F.R. § 930.130(a). The

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[27] Deck drainage can contain oil, detergents, and acids, which are generally neutralized prior to disposal. *See* Mobil Exhibit 27 at 3-7–3-8.

[28] Produced water is the water brought up from the well and constitutes a major waste stream from OCS activities. Produced water can contain hydrocarbons, biocides, coagulants, corrosion inhibitors, cleaners, dispersants, salts, benzene, cyanides, toluene, and trace metals such as cadmium, chromium, lead and mercury. *See* Mobil Exhibit 27 at 3-8.

[29] *See* Decision and Findings in the Consistency Appeal of Texaco, Inc., (Texaco Decision), May 19, 1989, at 4; Chevron Decision at 7; Korea Drilling Decision at 14.

Appellant has pleaded both grounds. The Department's regulations interpreting these two statutory grounds are codified at 15 C.F.R. §§ 930.121 and 930.122.

A. *Ground I: Consistent with the Objectives or Purposes of the CZMA*

The first statutory ground (Ground I) for overriding the State's objection to the proposed project is that the activity is consistent with the objectives or purposes of the CZMA. To make a finding on this ground I must determine that the proposed activity satisfies all four of the elements specified in 15 C.F.R. § 930.121.

1. *Element 1: Activity Furthers One or More Objectives of the CZMA*

To satisfy Element 1 of Ground I, I must find that the activity furthers one or more of the competing national objectives or purposes contained in the CZMA. 15 C.F.R. § 930.121(a). I find that the proposed project fosters one or more of the objectives of the CZMA, and therefore Element 1 is satisfied.

Congress has broadly defined the national interest in coastal zone management to include both the protection and development of coastal resources. Consequently, as stated in previous decisions, this Element normally will be satisfied on appeal. Decision and Findings in the Consistency Appeal of Amoco Production Company, (Amoco Decision), July 20, 1990, at 14. The State, however, has questioned whether the proposed drilling discharges, a subset of Mobil's overall exploration efforts at the Manteo site, further one or more of the competing national objectives or purposes of the CZMA. Mobil's proposed dis-

charges will satisfy this Element even if they only indirectly further the objectives or purposes of the CZMA.[30]

The State argues that Mobil's proposed drilling discharges do not contribute to the larger cause of offshore oil and gas exploration. State's Initial Brief at 23. Mobil's OCS exploration, however, includes exploratory drilling. The wastes from this drilling are what Mobil proposes to discharge into the ocean. Upon reviewing the record before me, I find that Mobil's proposed drilling discharges are directly associated with and further its proposed OCS exploration.[31]

Therefore, if Mobil's larger exploration activity at the site furthers the objectives or purposes of the CZMA, then Mobil's proposed discharges will indirectly further the objectives or purposes of the CZMA.[32] OCS exploration,

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30 *See, e.g.*, Decision in the Consistency Appeal of Ford S. Worthy, Jr., May 9, 1984.

31 The State argues that to share in the contribution of OCS exploration to the objectives or purposes of the CZMA, the discharges must be a necessary part of Mobil's proposed exploration. State's Initial Brief at 21, 24. Mobil first argues that the proposed activity is necessary to OCS exploration. Mobil's Initial Brief at 19. Mobil later argues that the proposed activity need only be associated with OCS exploration. Mobil's Final Brief at 7. Prior consistency appeal decisions shed little light on this issue. The Korea Drilling Decision speaks only of oil and gas exploration "activities." *See also* Texaco Decision at 5; Amoco Decision at 14; Chevron Decision at 22; Decision and Findings in the Consistency Appeal of Gulf Oil Corporation, (Gulf Oil Decision), December 23, 1985, at 4. I find it unnecessary for the purposes of Element 1 to determine whether the activity is a necessary part of Mobil's exploration activity.

32 The scope of the appeal is dictated by the scope of the proposed project. *See* LILCO Decision at 7. In the LILCO Decision, the Long Island Lighting Company (LILCO), applied to the U.S. Army Corps of Engineers (Corps) for a permit to perform dredging and jetty maintenance activities in conjunction with the construction of the Shoreham Nuclear Power Station (SNPS). LILCO Decision

development and production activities are included within the objectives and purposes of the CZMA. *See, e.g.*, Korea Drilling Decision at 7; Decision and Findings in the Consistency Appeal of Texaco, Inc., (Texaco Decision), May 19, 1989, at 5. The Department of Energy (DOE) states that the project lies in "one of the most promising natural gas prospects on the OCS."[33] The Department of the Interior (DOI) states that development of the Manteo Area Block 467 could benefit the natural gas market of the southeastern United States.[34] Based upon a review of the record, I find that Mobil's exploration for natural gas resources at this site furthers one or more of the competing national objectives or purposes contained in §§ 302 or 303 of the CZMA.

I therefore find that Mobil's proposed discharge activity indirectly furthers one of the objectives or purposes of the CZMA. In Element 2 I will determine the extent of the contribution of the activity to the national interest prior to performing the required balancing.

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at 1. The Secretary determined, however, that since the SNPS was beyond the scope of the appeal, comments on the contribution of the SNPS to the national interest did not contribute to the findings of the Secretary. LILCO Decision at 14, n.10. In the Korea Drilling Decision, the Korea Drilling Company (KDC) applied to the EPA for an NPDES permit that would authorize its drillship to discharge drilling wastes into the Pacific Ocean in certain OCS tracts off the California coast. The Secretary determined that KDC's proposed activity would encourage competition and thus further the explortaion for and development of OCS resources. *See* Korea Drilling Decision at 9.

33 Letter from Robert H. Gentile, Assistant Secretary, Fossil Energy, Department of Energy, to Gray Castle, Deputy Under Secretary for Oceans and Atmosphere, Department of Commerce, December 19, 1990 (DOE Comments).

34 Letter from David C. O'Neal, Assistant Secretary, Land and Miinerals Management, Department of the Interior, to Gray Castle, Deputy Under Secretary for Oceans and Atmosphere, Department of Commerce, January 22, 1991 (DOI Comments).

2. *Element 2: The Activity's Individual and Cumulative Adverse Effects on the Coastal Zone are Outweighed by Its Contribution to the National Interest*

In order for the Appellant to meet this Element, I must find that the disputed activity, when performed separately or when its cumulative effects are considered, does not cause adverse effects on the natural resources of the coastal zone substantial enough to outweigh its contribution to the national interest. 15 C.F.R. § 930.121(b). To perform the required balancing, I must first adequately identfy the proposed project's adverse effects on the natural resources or land and water uses of the coastal zone and its contribution to the national interest. *See* Texaco Decision at 6. As stated above, if the information in the record is inadequate, such that I cannot adequately identify the adverse effects or the contribution to the national interest, I will be unable to perform the weighing, and therefore unable to find for Mobil on this Element. *See* Anton Decision at 5, n.8.

I conclude that the information in the record is insufficient for me to adequately identfy the adverse coastal zone effects of the activity. Accordingly, I am unable to find for Mobil on Element 2 of Ground I.

a. *Adverse Effects on Coastal Resources and Uses*

In evaluating the adverse effects of the project on the resources of the coastal zone, I must consider the adverse effects of the project by itself and in combination with other past, present, or reasonably foreseeable activities affecting the coastal zone.[35] In this case, other activities

[35] *See* Chevron Decision at 24; Texaco Decision at 6; Gulf Oil Decision at 8. Given that the probability of a hydrocarbon discovery is estimated by the MMS to be less than ten percent, I find that development and production of such reserves is not reasonably foreseeable. In this case I will consider the cumulative effects of activities occurring during the drilling period. *See* Texaco Decision at 24.

include Mobil's activities not covered in its NPDES permit application such as discharges on the ocean floor,[36] accidents or improper conduct of an activity. *See* Chevron Decision at 24; Korea Drilling Decision at 10. Prior to examining effects of Mobil's proposed activity, however, I must first identify the fates[37] of the discharges. The fates of drilling discharges will depend on various physical, chemical and biological processes that serve to disperse or concentrate constituent elements of the discharges. *See* NRC 1983 Report at 49.

Fates of Mobil's Drilling Wastes

The extent of adverse impacts will depend in part on the concentration of the discharges as well as on the length of time of exposure to the discharges. *See* Mobil Exhibit 27 at 10-1. In this section I will examine information on the physical and chemical oceanography of the drill site area, in particular the effect of currents on the dispersion of the drilling wastes, both near the surface and near the seafloor.[38]

[36] The MMS has listed other activities associated with Mobil's marine discharge activities which are not covered in its NPDES permit application: placing and removing drillship mooring anchors; support vessel transpotration; physical presence of the drillship. MMS Comments at 37.

[37] *See, e.g.*, EPA, *Assessment of Environmental Fate and Effects of Discharges from Offshore Oil and Gas Operations*, (1985)(Mobil Exhibit 24). In general, the term "fates" refers to what happens to the discharges as they enter an ecosystem.

[38] The NRC has provided a framework for evaluating the adequacy of physical oceanography information. *See* NRC 1989 Report at 18-24. *See also* ESRP Report at 27-29.

Mobil plans to drill in a water depth of 2,690 feet. The ocean floor is a generally sloping terrain, marked with ridges and valleys. The physical environment at that location results from the interaction of the Gulf Stream, the Deep Western Boundary Current, the Slope Sea Gyre and Virginia coastal waters. A report prepared for Mobil on currents at Manteo Area Block 467, states that close to the maximum currents of about 5 knots are likely to occur near the site, and that high speed currents can be expected about 56% of the time.[39]

In its report to the Secretary of the Interior, the ESRP states that the local currents, upon which the fates of Mobil's discharges depend, are well-characterized for the Manteo site. ESRP Report at 28. The ESRP report also states that physical information in relation to these discharges is adequate. *Id.*

NMFS generally comments that the information on the physical and chemical oceanographic process in this area is inadequate and does not support the conclusions of Mobil or the Minerals Management Service (MMS).[40]

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39 Science Applications International Corp., *Characterization of Currents at Manteo Block 467 off Cape Hatteras, NC*, Draft Final Report (1990) (State Exhibit 27), at 1.

40 NMFS states that:

> [T]he very low adverse impact predictions may be inaccurate and unsubstantiated. Documentation that current structures (lateral, horizontal, and vertical components) are understood sufficiently to support the dispersion dilution scenario is needed.

Letter from Andreas Mager, Jr., Assistant Regional Director, Habitat Conservation Division, National Marine Fisheries Service, to Minerals Management Service, Department of the Interior, December 13, 1989 (NMFS Letter). NMFS states that certain conclusions reached in the DER regarding current patterns are not adequately supported and that the DER should either substantiate these conclusions or acknowledge that the conclusions are speculative. *Id.*

In particular, NMFS states that the concentration of marine organisms along thermal and salinity fronts raises the possibility that Gulf Stream hydrology may similarly concentrate discharges, and that Mobil has not adequately considered this issue. *Id.* NMFS also states that the relationship between ocean hydrology and fish migrations and concentration of larvae is not adequately described in the DER. *Id.*

Based upon a review of this information, I find that current movements near the site area are indeed complex and incompletely understood. I also find that many of the chemical and biological characteristics of the site area are influenced by the site's physical characteristics. Nevertheless, upon reviewing the record of this appeal, I find that the physical information in relation to Mobil's discharges is adequate. I am persuaded that Mobil's near-surface discharges will be rapidly diluted by the currents, thus reducing their impact. Furthermore, I find that effects from Mobil's near-surface discharges are most likely to be confined to exposures within a small area around the point of discharge. *See* NRC 1983 Report at 4.

As to the fates of the seafloor discharges, ten simulations were run using the Offshore Operators Committee (OOC) mud discharge model to estimate the distribution of these discharges.[41] One limitation of the simulation model, however, is that seafloor discharges (i.e., from the drill hole) are not normally modeled. OOC Introduction at N-6. Furthermore, the scientists who performed the simulation modeling stated that "some artifice was necessary to simulate the possible behavior of bottom discharges. We do not know how accurate those simulations are." *Id.* One

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41 Introduction of the Offshore Operators Committee Simulation Modeling for the Manteo Prospect taken from Mobil's Draft Plan of Exploration (OOC Introduction). *See* FER at Appendix L.

conclusion reached based upon the simulation modeling is that "[t]he average thickness of cuttings inside the 20 m circle [around the drill site] was 77 cm for minimum currents at the bottom, and 50 cm for maximum currents at the bottom."[42] The same study also concludes that "a small area shows quite heavy concentrations of cuttings, up to 70 cm thick within 10 m of the discharge well head on the bottom, however there is at most 0.3 km^2 covered with drilling mud and cuttings to a depth greater than 0.1 cm."[43] *Id.* at 28. Based upon a review of the record, I find that most of the seafloor discharges will be distributed in the immediate vicinity of the project activities.

Possibility of Unpermitted Discharges

In order to fully identify and evaluate the cumulative impacts of Mobil's proposed activity, I must consider any discharges outside of the scope of the proposed NPDES permit. I will examine, among other things, any evidence of Mobil's record of unplanned discharges at other sites, as well as any evidence of the possibility of other unplanned or unpermitted events, such as those associated with high currents and unpredictable weather at the site. These discharges could affect the resources of the State's coastal zone. *See* Korea Drilling Decision at 15.

The record contains relevant information on the likelihood that Mobil will accidentally discharge in excess of NPDES permit conditions. First, as to the proposed limits

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42 Brandsma, *Simulation of Benthic Accumulations of Mud and Cuttings Discharged from Mobil Oil Corporation Well, Manteo Area, Block 467, Cape Hatteras, North Carolina*, November 28, 1989, at 27. *See* FER at Appendix L.

43 MMS reports that the drill cuttings are expected to accumulate a maximum of 77 centimeters within 10 meters of the drill site. FER at IV-64.

on cadmium and mercury discharge concentrations, Mobil states: "Abundant data demonstrate that the EPA's proposed permit condition establishing effluent limitations equal to 1 mg/kg each of the cadmium and mercury in the whole drilling fluid would present potentially serious compliance problems for Mobil." Mobil Exhibit 18 at 58. Mobil also states that the proposed cadmium and mercury permit limits "cannot be consistently met." *Id.* Given these statements, I find that it is possible that Mobil will discharge cadmium and mercury in excess of the proposed NPDES permit conditions. Second, the record indicates that for an OCS operation offshore Alabama, Mobil paid a $2 million settlement and acknowledged that Mobil employees discharged in violation of NPDES permit conditions.[44] I therefore find that it is possible that Mobil could deviate from other NPDES permit conditions, in addition to the proposed cadmium and mercury permit limits.

I will now examine the possibility of unplanned discharges associated with high currents and unpredictable weather at the site. MMS states that "the flow of the Gulf Stream and the potential for the occurrence of rapidly forming storms offshore North Carolina could create extreme and hazardous oceanographic and weather conditions in the area." FER at IV-8. Mobil's drillship would be able to remain in the drilling mode in up to 3.5 knots of current. FER at IV-10. However, close to the maximum currents of about 5 knots are likely to occur near the site, and high speed currents can be expected about 56% of the time.[45] Upon reviewing the record, I find that there may

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44 Settlement Agreement between the State of Alabama and Mobil (State Exhibit 29).

45 D. Bolze, *The Ecological Effects of Outer Continental Shelf Oil and Gas Development—Both Offshore and in the Coastal Zone*, (1989) (State Exhibit 27), at 1.

be unplanned discharges during emergency disconnects of the well.

MMS contends that the risk of excessive discharges occurring and resulting in substantial adverse effects on the natural resources of the State's coastal zone is insignificant. MMS Comments at 30-31. In particular, MMS concludes that the procedures for an emergency disconnect of the well assure insignificant impacts from excessive discharges. *See* MMS Comments at 34-36. I am unpersuaded, however, by the comments of MMS. I have found that unplanned discharges are possible. I now find that information on the possible extent of discharges outside of the scope of the NPDES permit is inadequate for me to assess their risk.

Nature of the Discharges

Mobil's proposed wastes can have physical and chemical effects on living organisms, including the State's fisheries. Physical effects can result from sedimentation, increased turbidity and substrate alteration. Chemical effects include toxicity and bioaccumulation of metals and organic compounds. *See* NRC 1983 Report at 75.

Mobil's wastes to be covered under the proposed NPDES permit include drilling fluids (muds), drill cuttings, sanitary wastes, domestic wastes, deck drainage, produced water, produced sand, and other miscellaneous wastes. Mobil estimates that its wastes will include small amounts of such metals as arsenic, barium, chromium, cadmium, copper, mercury, nickel, lead and zinc. Mobil's NPDES Permit Application. The record discloses that the permit would prohibit the discharge of diesel oil, limit mercury and cadmium discharge concentrations of 1 mg/kg, prohibit free oil in drilling fluids and cuttings, limit oil and grease discharge concentrations to 72 and 48 mg/l daily

maximum and daily average, respectively, prohibit free oil in produced waters, and prohibit free oil in all other discharges. Mobil Exhibit 27 at 10-9. As previously indicated, however, Mobil's cadmium and mercury discharges may vary because of the varying concentrations of barite in drilling fluids and because of metal contributions from the formation into which it would drill. Mobil Exhibit 18 at 58. Mobil's drilling fluid may also contain paraformaldehyde, a biocide. *See* Mobil's NPDES Permit Application.

Mobil also plans to discharge wastes near the seafloor during the initial phase of the drilling operation, prior to setting the riser. There is little information in the record, however, on the composition of these wastes since these wastes would not be covered by the proposed NPDES permit. Again, I note that much of Mobil's information in the record only examines possible impacts from discharges within the scope of an NPDES permit. My analysis of the cumulative effects of Mobil's permitted discharges includes the effects of these wastes. Moreover, it is likely that these wastes will affect the benthic environment which will in turn affect the State's coastal fisheries.

Mobil claims that the drilling fluids to be used have a low toxicity, and that studies have shown that drilling fluids discharged into the ocean disperse rapidly into nontoxic concentrations. Mobil's Final Brief at 31. The State challenges Mobil's claim that the drilling fluids have a low toxicity. Specifically, the State asserts that the use of *Fundulus heteroclitus* is unsuitable for determining toxicity of drilling fluids to oceanic fish or invertabrates since, unlike oceanic species, *Fundulus* eggs, larvae, and adults are normally associated with high turbidities and sedimentation rates. State Objection Letter. The State indicated that toxicity information must be provided for species

adapted to the oceanic environmental conditions found at the proposed drill site. *Id.* While I am concerned with the toxicity of the proposed wastes upon the resources near the proposed drill site,[46] bioassay tests are at least useful in identifying the relative toxicities of components. *See* NRC 1983 Report at 76. Thus, I find that Mobil's proposed water-based drilling fluids are generally less toxic than oil-based drilling wastes.

I am unable, however, to extrapolate from the evidence in the record that Mobil's wastes are not toxic to organisms found at the drill site. First, the toxicity of the discharges will vary depending upon the organisms tested and the life cycle stage of the organism. I am persuaded that the drill site area contains sensitive larval species of commercially important fish. Second, Mobil offers little discussion of the effects of paraformaldehyde, a nonpersistent biocide, in its discharges. *See* State Exhibit 27 at 7. While paraformaldehyde is less toxic than chlorinated phenol biocides, the carcinogenicity of formaldehyde in solution is unknown.[47] *See* NRC 1983 Report at 82. Third, there is little discussion of the effects of unplanned, but reasonably foreseeable discharges. Finally, there is too little information on the ecological and food web effects of

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[46] In its 1983 report, the NRC provided considerations in using available information in assessing the potential effects of drilling discharges. The NRC reported that most information about the effects of drilling fluids on marine organisms comes from laboratory experiments, and that the organisms most frequently used in these tests have been coastal and estuarine species readily available for testing and easily maintained in the laboratory. NRC 1983 Report at 129. The NRC also stated that direct measurement of the effects of drilling fluids in the field is inherently more rigorous than models and laboratory toxicity tests. *See Id.* at 133.

[47] Paraformaldehyde depolymerizes to formaldehyde upon contact with water. NRC 1983 Report at 82.

Mobil's discharges for me to conclude that Mobil's discharges are non-toxic.[48]

Mobil's wastes may contain hydrocarbons and heavy metals, which are discharges of major concern. *See* Mobil Exhibit 27 at 10-2, 10-4. While Mobil's proposed discharges would not contain diesel oil, Mobil's wastes could contain other hydrocarbons such as benzene. Benzene is a carcinogen. Heavy metals present in Mobil's discharges may affect resources through bioaccumulation. The EPA examined biological transport processes, including bioaccumulation. *See* EPA's *Assessment of Environmental Fate and Effects of Discharges from Offshore Oil and Gas Operations,* (EPA 444/4-85-00), (Mobil Exhibit 24) at

[Figure 2. Conceptual Epipelagic Food Web for Tropical-Subtropical Waters Omitted in Printing]

3-64 - 3-84. I am persuaded that the information in the record is inadequate for me to conclude that there is a low potential for bioaccumulation. While several variables determine the bioavailability of metals,[49] Petrazzuolo (1983) states that due to the persistence of metals, the high toxicity of some metals, the absence of laboratory data on mercury, and the inability to correlate filed [sic] and laboratory measures, a finding of no significant potential effect is inappropriate at this time. Mobil Exhibit 27 at 5-24. Mobil's claim that mercury and cadmium found in drilling fluid discharges predominantely occur in insoluble

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[48] Mobil's POE contains a diagram of the relevant food web, with the omission of humans as the highest trophic level consumers. *See* Figure 2.

[49] These variables depend on both the compounds in which the metals are found and on the size, type and feeding behavior of the organism involved. *See* NRC 1983 Report at 109-110; Mobil Exhibit 27 at 5-23.

forms, also leads me to conclude that some mercury and cadmium will occur in soluble, and therefore potentially toxic and bioavailable, forms. *See* Mobil Exhibit 18 at 66-67. Finally, I note that Mobil's discharges of lead will add to the already elevated levels of lead (up to 17 ppm) in the environment near the Manteo area. *See* Mobil's Final Ocean Discharge Criteria Evaluation Report, December 8, 1989 (Mobil Exhibit 19) at 67. Given that the oceans around Mobil's proposed activity will be harvested for human consumption, I find that the extent of adverse effects of even small amounts of these chemicals entering the food web and affecting the food supply could be great.[50]

Effects on Biological Resources

In this section I will examine the risk of individual and cumulative adverse effects from the proposed activity on the affected biological resources and uses of those resources.[51]

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50 The ESRP states that there should be a better understanding of the possibilities of contamination of food supplies by OCS activities for all the large predators. *See* ESRP Report at 47. Mobil discounts the effects of its proposed wastes entering the food supply by stating that at least one of its proposed waste components, bentonite clay, is used in cosmetics and as a food additive. Mobil's POE, vol. 1 at B17-21. While bentonite clay may be an allowable food additive, other of Mobil's proposed wastes, such as heavy metals and hydrocarbons, may not.

51 The State has asserted that Mobil has underestimated the biological importance of The Point. NMFS has characterized the natural resources found in Block 467 as unique. NMFS Letter. NMFS also states that the biological significance and later potential for adverse impacts is severely underestimated. *Id.* In general, the ESRP has stated that there needs to be a study of the ecological relationship between The Point's unusual biological resources and its physical properties. *See* ESRP Report at 36-37, 47.

Fish Resources:

One of the East Coast's most important commercial and recreational fisheries is located in the waters overlying the proposed drill site.[52] FER at III-83. The proposed drill site area serves as an important migratory pathway and feeding habitat for pelagic fishes. Yellowfin, bluefin, and bigeye tuna, white and blue marlin, sailfish, swordfish, wahoo, and dolphin are caught there by North Carolina fishermen.[53] In addition, many target and prey species are believed to spawn near the western boundary of the Gulf Stream. Thus, the proposed drill site, even though it is located outside of the State's coastal zone, is situated such that an important food source for North Carolinians would be exposed to Mobil's proposed wastes.[54]

Mobil states that the species composition found at the drill site area is representative of the overall areal population, and that the species found were generally similar to those observed in previous collections conducted during the spring and fall months off the South Atlantic Bight and in the eastern Gulf of Mexico. *See* Mobil's Final Brief at 30-34. Upon reviewing the record, I find that

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52 The first portion of the State's proposed study is an investigation of larval and juvenile abundance and distribution in the vicinity of the Mobil project.

53 The Secretary's Exxon SRU Decision at 7-10 interpreted Element 2 to include adverse effects on coastal uses. In that case, Exxon's proposed OCS POE affected a thresher shark fishery important to California fishermen.

54 In addition to citing coastal uses of The Point, the State argues that the area serves as spawning habitat for species that are important to North Carolina fisheries, including both prey and target species (menhaden, spot, croaker and flounder) that migrate into North Carolina's coastal waters. Memorandum from Bill Hogarth, Director, North Carolina Division of Marine Fisheries, to Roger Schecter, Director, North Carolina Division of Coastal Management, May 21, 1990, at 2, Attachment 6 to State Objection Letter.

while the species composition may not be unique, there is an unusual abundance of fish resources found near the drill site area, and that the area serves as an important migratory pathway, feeding habitat and spawning ground for several commercially significant species.

As to the possible effects on fishery resources, MMS states:

> [I]mpacts on fish resources may result from the effects of [the] discharge of muds and cuttings [and] treated sanitary and domestic waste. . . . Individuals may be subject to sublethal effects *before* dispersion and dilution of drilling mud [and] other waste discharges.

FER at IV-216 (emphasis added). In essence, the fishery resources, upon which the State's commercial and recreational fishing industries depend, may be exposed to and potentially affected by Mobil's wastes, with individual fish possibly subjected to "sublethal effects." [55]

MMS concludes that the expected impacts of the proposed discharges on commercial and recreational fishing would be low-level and temporary in nature. MMS Comments at 21. The record lacks information, however, on the marketability of fish which may have been exposed to Mobil's wastes and subjected to sublethal effects.[56]

MMS also concludes that under its "worst case" analysis of maximum level of impacts on fish resources, the anticipated effects would be minor and indistinguishable from natural background variability. The worst case analysis, however, has limited usefulness to my analysis for four

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55 *See* FER at IV-213-219 for a discussion of potential effects on the State's fisheries resources.

56 *See infra* at 35 for a discussion of other potential socioeconomic effects.

reasons. First, as stated above, resources may be affected by Mobil's wastes *before* dispersion. Second, the analysis does not fully examine ecological effects. Third, the conclusions on natural variability may be flawed.[57] Fourth, the analysis does not fully account for cumulative impacts.

In commenting on this appeal, the National Marine Fisheries Service (NMFS) identified informational concerns regarding fisheries studies and stated that additional studies and information were needed. NMFS Comments. In comments on the DOI's Draft Environmental Report (DER)[58] on Proposed Exploratory Drilling offshore North Carolina, NMFS stated:

> The DER does not adequately address fishery issues. Discussions on effects of spills or accidents on eggs, larvae, and food organisms; recreational and commercial fishing activities; potential alterations of migratory patterns of important pelagic fishes; occurrence of latent fisheries resources; habitats; and fisheries operations in the project area are inadequate.

NMFS Letter. NMFS states that "many of the finfish that inhabit the site as eggs and larvae are not discussed. More information on distribution, life history aspects, and fish-

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57 The ESRP states that the DOI decision documents are flawed in their discussion of the significance of natural variabiilty. *See* ESRP Report at 45-46. The ESRP states:

> Purging from the decision documents the unjustified argument that variable ecological resources and variable driving forces do not deserve the same level of protection from environmental impacts as more invariant parameters is needed to render the interpretations and conclusions adequately defensible.

ESRP Report at 46.

58 Given that NMFS' comments on this appeal were forwarded after the completion of the FER, one inference that can be drawn is that its prior concerns with the DER remain unresolved.

eries, should be provided on tunas, dolphin, wahoo, and marlins." *Id.* The NMFS comments continue:

> The uniqueness of the Cape Hatteras area as a faunal mixing zone is not adequately addressed. The drill site is located near [an area] known for its value to migrating pelagic fishes. The area also is a critical feed site for tunas.

Id. NMFS also states that the "[e]cology, life history, and habitat requirements of epipelagic fishes are not well known. Accordingly there is insufficient basis for most of the assumptions made in the DER regarding potential impacts." *Id.*

Upon reviewing the information in the record of this appeal, I find that I am unable to adequately assess the risk of adverse impacts to fish resources. Consequently, I am unable to adequately identify the adverse effects on fish resources. While I previously found that Mobil's studies adequately predict a rapid dispersion of wastes near the surface, I was unable to find that Mobil's wastes will have a low toxicity. Furthermore, the State's fisheries may be subjected to sublethal effects *before* dispersion and dilution of Mobil's wastes. Finally, I find that the fish resources at the proposed drill site are sufficiently rich, and their ecology sufficiently important, to require additional site-specific information.

Benthic Communities:

Benthic communities include, among other things, both infaunal and epifaunal organisms. Densities of infauna and epifauna near the Mobil drill site have been found to be unusually high.[59] The North Carolina Division of

[59] The third portion of the State's proposed four-part fisheries study is to measure the effects of drilling waste deposition on bottom organisms.

Marine Fisheries has stated that Block 467 has the highest benthic infauna population of any deep water site on the east coast. The State argues:

> The benthic assemblages found near the drill site are unique on the western North Atlantic slope. While species diversity is low, the benthic infauna exhibit extremely high biomass and species abundances. . . . The concentrations of demersal fishes are larger than usual for this water depth.

Summary and Assessment of Ad Hoc Live Bottom Committee (State Exhibit 23) at 4. Commercially harvested demersal fishes prey on infaunal organisms.[60] *See* FER at III-82, III-101-104, 180-183. Mobil argues that its Live Bottom Survey shows that the benthic organisms are commonly occurring and widely distributed. Mobil's Initial Brief at 42. Upon reviewing the record, I find that the benthic community near the drill site is unusual for its high biomass and productivity. Moreover, I find that benthic communities are directly linked to the food web supporting the State's fisheries.

Potential damage to benthic and infaunal communities may be physical and/or chemical.[61] NRC 1983 Report

[60] Mobil's sweeping statement in its Final Brief that "there is absolutely no indication that any coastal fishes or other coastal wildlife resources utilize the benthic habitat, benthic food sources, or benthic-derived energy in any form" is belied by statements in the FER and the EA. *Compare* Mobil's Final Brief at 29 *with* FER at III-82, III-101-104, 180-183.

[61] Upon reviewing existing information on the fates and effects of drilling fluids and cuttings on the OCS, the NRC states that "[t]he postdepositional fates of drilling fluids and the recovery of altered communities are the processes for which data are most limited and predictions most tenuous." NRC 1983 Report at 136. The NRC advises caution in extrapolating observations of adverse effects from one region to another. *See Id.* at 137.

at 5. Factors influencing damage to benthic communities include the type and quantity of drilling discharges, the hydrographic conditions at the time of discharge, and the height above the bottom of the discharges. FER at IV-61. The effects also depend on how quickly the benthic community recovers, not only in total density and biomass, but also in the composition and structure of the community. NRC 1983 Report at 135. Benthic communities may also be damaged from the placing and removal of drillship mooring anchors. *See* MMS Comments at 37-38.

I will evaluate the benthic impact of Mobil's discharges as well as the emplacement and removal of drillship mooring anchors on the benthic environment. Mobil's drilling plans include both near-surface and seafloor discharges. Based upon a review of the information in the administrative record, I find that there is a low likelihood that the near-surface discharges will have a measurable adverse impact on benthic communities given the water depth and the current movements. Mobil's drilling plans, however, also include seafloor discharges and anchor placement. As previously stated, Mobil has performed simulation modeling of the deposition of seafloor discharges, for which I found that the seafloor discharges will be distributed in the immediate vicinity of the drill site.

MMS comments that the only expected negative effects of the proposed discharges would be from the deposition of drilling muds and cuttings directly on the seafloor during the drilling of the initial portion of the well. MMS Comments at 17. In its FER, MMS states that the major effect of the release of drilling muds and cuttings directly to the seafloor will be to bury and kill local benthic organisms. *See* FER at IV-211; MMS Environmental Assessment of Exploration Plan for Manteo Area Block 467 (EA), Appendix E at E-4. Upon reviewing the record, I find that

the major short term effect of the deposition of seafloor drilling discharges will be to bury and kill benthic organisms in the immediate vicinity of the drill site. I also find, however, that possible sublethal impacts include altered burrowing behavior, chemosensory responses, alterations in embryological or larval development, depressed feeding, decreased food assimiliation and growth efficiency, and altered respiration and nitrogen excretion rates. *See* Mobil Exhibit 27 at 10-6. Thus, I find that in the immediate vicinity of Mobil's drill site, Mobil's proposed wastes may either destroy or poison a food source for part of the State's demersal fishery resources.[62]

As to the period of the diminishment in value of these natural resources, since I am unable to conclude that the benthic community would be accustomed to burial of the magnitude envisioned in the modeling studies, I decline to accept Mobil's argument that the area will become rapidly repopulated. Rather, as indicated in the FER, I find that recovery of these deep sea fauna could take several years and the recolonizing community may be significantly different from the pre-drilling one.[63] FER at IV-212.

MMS has also stated that the emplacement and removal of drillship mooring anchors will cause localized destruction of benthic organisms. MMS Comments at 38. I

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[62] In discussing the effects of Mobil's proposed wastes on benthic communities, Mobil discounts the effects on the food supply by stating: "The primary drilling fluid to be discharged at the sea floor is simply prehydrated bentonite clay (see Appendix I-1). Bentonite clay is a naturally-occurring material that is used in cosmetics and as a food additive." Mobil's POE, vol. 1 at B17-21.

[63] The ESRP has indicated that the question of the recovery rate of the benthic community from the effects of Mobil's proposed wastes is unanswered. *See* ESRP Report at 48-49. The NRC states that benthic recovery rates from complete annihilation can be many years on the continental slope. NRC 1983 Report at 136.

agree with the MMS' conclusion, however, upon review of the record, I find that the possible extent of this damage should be minimal.

Finally, NMFS and the ESRP have raised informational concerns on the possible impacts of Mobil's proposed waste discharges on the ecology of the benthic community. NMFS comments that the relationship between the high benthic infauna population and the proposed action should be addressed. *See* NMFS Letter. The ESRP states that a survey of the seafloor in the vicinity of the Manteo Unit should be completed prior to initiation of exploratory drilling, and that "the limited knowledge of the geographical extent of the unusual benthic community around the Manteo drill site is inadequate to describe what fraction of this system would be at risk during deposition of muds and cuttings." ESRP Report at 39. The ESRP states that this benthic survey should identify the geographic extent and degree of uniqueness of the unusual benthic community. ESRP Report at 45. I agree with NMFS and the ESRP. I find that while the record identifies certain adverse effects, I am unable to adequately assess other ecological impacts of Mobil's proposed action on the benthic communities.

In summary, I found that the benthic communities are directly linked to the food web supporting the State's fisheries. While I found that the effects of Mobil's near surface discharges on the benthic environment will be minimal, I found that Mobil's seafloor discharges are likely to damage or destroy benthic communities in the immediate vicinity of Mobil's proposed drill site. I also found that the recovery period for this richly populated area could be several years. Finally, I found that there is presently inadequate information for me to adequately assess other ecological impacts on the benthic communities.

Plankton and Near Surface Resources:

The near surface environment includes a *Sargassum* community as well as planktonic and nektonic organisms.[64] The *Sargassum* communities provide habitat, food and protection to juvenile finfish and endangered sea turtles, and are closely connected to the State's fisheries. Tuna and dolphin feed on juvenile fish, crabs, and shrimp which occur in the *Sargassum* community. Mobil Exhibit 19 and 36. Phytoplankton and zooplankton constitute a major portion of the food base for pelagic food webs. Mobil Exhibit 27 at 6-1. In addition, most fish have planktonic eggs and larvae. Mobil Exhibit 19 at 28.

Mobil claims that the types of *Sargassum* which are found near the drill site are found over a very wide ocean area. Mobil's Initial Brief at 43; Mobil's Final Brief at 32. Mobil claims that due to the rapid dispersion of the discharges and the naturally short regeneration times of planktonic species, there will be minimal short term impacts. Mobil's Final Brief at 32.

Even though the proposed discharges would be shunted at least 25 feet below the surface of the water and the expected upper limit of the discharge plume is approximately 30 feet below the surface, near surface organisms, including plankton, could be affected by Mobil's drilling discharges. *See* FER at IV-207. If plankton come in contact with drilling discharges, the photosynthetic production of phytoplankton could be reduced due to in-

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[64] *See* FER III-65—III-70 for a summary of information collected on the *Sargassum* community known to occur in the area of the proposed activity. The second part of the State's proposed four-part fisheries study is to gather additional information centered on the *Sargassum* community. The State has designed the study to investigate the abundance and size of *Sargassum* rafts near Block 467 and summarize information on the *Sargassum* community as a source of food for various fish species.

creased turbidity of the water; filter feeding and respiratory functions could be harmed by contact with particulates; and there may be lethal or sublethal effects. *Id.* These effects would vary depending on the currents. The FER concludes, however, that:

> While it is not known with certainty whether the availability of phytoplankton as a food source for zooplankton grazers eventually affects the abundance or productivity of major fisheries, drilling discharges are not expected to result in measurable impacts on populations of phytoplankton or on the marine food web.

FER at IV-207; *see also* EA at 51. MMS also states that its "worst case" analysis looked at the possibility of the proposed discharges contacting the "sensitive" *Sargassum* communities. MMS Comments at 51. MMS concluded that there would be no anticipated measurable effects on the *Sargassum* or associated organisms, including fish, species fed on by fish, and marine turtles. MMS Comments at 51. MMS also states that any effects on fish eggs and larvae would be minimized due to the proposed shunting of the discharges 25 feet below the sea surface. MMS Comments at 20.

In addition to expressing the view that there is inadequate information on the ecology of the drill site, NMFS states that "the DER fails to address adequately the concentration of marine fauna along thermal and salinity fronts and the potential consequence of oil spills and other toxic releases along these fronts." NMFS Letter.

The ESRP states that ecological information on the functioning of the *Sargassum* community is inadequate. *See* ESRP Report at 35-38. In addition, the ESRP states that what is needed is an "enhanced understanding of the proc-

esses that control the function and production of this *Sargassum* system." ESRP Report at 38.

Based upon a review of the information contained in the record, I find that for the purposes of this appeal, there is inadequate information on the effects of the proposed activity on near-surface and planktonic resources. While I accept the conclusions that the near surface discharges will be rapidly dispersed, given the potential ecological importance of the *Sargassum* community to the State's fisheries, and the presence of sensitive larval forms of the State's fisheries, I find that the potential for significant impacts is great enough to merit further study before an informed decision can be made.

Marine Mammals:

There are several species of cetaceans and pinnipeds which can be found in the waters off North Carolina, and which can be grouped into regularly occurring species, migratory species, and rare or unknown-occurrence species.[65] *See* Mobil Exhibit 27 at 6-24. As with many of the State's coastal resources, the range of marine mammals may include both State and Federal waters. Several species are endangered or threatened or recognized as species of undetermined status by the State and intra-scientific community. Mobil Exhibit 27 at 6-25. The record contains biological summaries for species of marine mammals that frequent this area. *See* FER at III-192 - III-222; Mobil Exhibit 18 at 47-49.

The following possible adverse effects have been disclosed in the record. Underwater noise generated by drilling ac-

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[65] In its objection letter the State indicated that it wanted information on use of the site by marine mammals, specifically identifying numbers of individuals, numbers of species, and activities by species at the site.

tivities could affect cetaceans. FER at IV-220, 225. Vessel and aircraft traffic could produce startle reactions in cetaceans. FER at IV-222. Certain wastes may produce sublethal effects on cetaceans. *See* FER at IV-223-224. Turbidity could affect the sight and echolocation capabilities of some marine mammals if they swim within the discharge plume. Prey species of cetaceans could be displaced and the prey-locating ability of predators could be diminished by the presence of mud particles in the water column. FER at IV-64. The FER also points out, however, that only predators in a weakened physical state would experience any effects if they were unable to move to a nearby area where prey is obtainable. FER at IV-64.

In spite of the evidence suggesting possible harassment of, and injury to, marine mammals, Federal agencies offered few other comments on the proposed project's effects on marine mammals. In particular, NMFS, the Federal agency with jurisdiction over certain marine mammals, provided few specific comments on the need for information on marine mammals. MMS concluded that the level of impacts on marine mammals is considered to be very low. FER at IV-224, 227.

After reviewing the information in the record on the effets of the proposed project on marine mammals, I find that the information is sufficient for the purposes of this appeal and that the individual and cumulative effects of the proposed project will be minimal. In assessing the risk of possible injury to the endangered and threatened marine mammal population, I note that while the extent of the harm could be high to the marine mammals' diminished numbers, the likelihood of damage will be low due to the rapid dilution of near-surface wastes and the temporary nature of the drilling activity. I find that any harassment of marine mammals is likely to be temporary.

In making these findings I note that NMFS has expressed few specific concerns as to the effects of the proposed project on marine mammals.

Sea Turtles:

Five species of endangered or threatened sea turtles are found within the coastal and offshore marine habitats of North Carolina.[66] *See* FER at III-222-237; Mobil Exhibit 18 at 49-52. The endangered species are the Kemp's ridley (*Lepidochelys kempi*), hawksbill (*Eretomochelys imbricata*), and leatherback turtle (*Dermochelys coriacea*). The green turtle (*Chelonia mydas*) and loggerhead turtle (*Caretta caretta*) are classified as threatened. FER at III-222.

Potential impacts to sea turtles include underwater noises, vessel and aircraft traffic, drilling discharges and hydrocarbon releases. *See* FER at IV-229-231. Juvenile green and loggerhead turtles, and possibly those of other species, could be exposed to Mobil's wastes. *See* EA at E-8. In addition, prey species of sea turtles could be displaced and the prey-locating ability of predators could be diminished by the presence of mud particles in the water column. FER at IV-64.

Mobil argues, however, that the proposed activity is expected to have few impacts on turtles in the area. Mobil states that the drilling would not alter natural currents and would not disrupt the *Sargassum* mats which provide habitat to juvenile turtles. Mobile Exhibit 18 at 51. Mobil states that sea turtles can easily avoid ships and

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[66] In its objection letter the State indicated that it wanted information on use of the site by sea turtles. Specifically, the State wants information on numbers of individuals, numbers of species, and activities by species at the site.

that the turtles will be protected by NPDES permit conditions, including subsurface shunting of discharges. *Id.*

MMS states that due to the primarily inshore distribution of marine turtles during the proposed drilling period, the impacts of the proposed project are likely to be minimal. *See* FER at IV-231. Planktonic prey species such as jellyfish are unlikely to be displaced by the discharges. FER at IV-230. A temporary increase in water turbidity could, however, affect a turtle's ability to detect prey. *Id.* MMS based its conclusions principally on the limited areal extent and duration of the discharge plume. *See* EA at F-8.

Other Federal agencies offered few other comments on the proposed project's effects on sea turtles. In particular, NMFS, the Federal agency with jurisdiction over endangered seat turtles, provided few specific comments on the need for information on sea turtles.

The ESRP concludes that the ecological information on the *Sargassum* community as habitat for juvenile sea turtles is inadequate for all phases of oil and gas resource exploitation. *See* ESRP Report at 8, 37, 48. The ESRP states that "knowledge of the spatial and temporal abundance of hatchling sea turtles in the *Sargassum* community of the western wall of the Gulf Stream is inadequate to evaluate the risks of oil and gas activities on these endangered and threatened species." ESRP Report at 37.

After reviewing the information in the record on the effects of the proposed project on sea turtles, however, I find that the information is sufficient for the purposes of this appeal and that the individual and cumulative effects of the proposed project will be minimal. In assessing the risk of possible damage to the endangered and threatened sea turtle population, I note that while the extent of the harm could be high to the turtles' diminished

numbers, the likelihood of damage will be low because of the rapid dispersal of near surface discharges and the primarily inshore distribution of sea turtles during the drilling period. In making these findings I also note that NMFS has expressed no specific concerns as to the effects of the proposed project on endangered or threatened sea turtles.

Birds:

The Manteo area is used as a feeding ground by many resident and migratory species of seabirds which also frequent the State's coastal zone. The waters along the western edge of the Gulf Stream off Cape Hatteras are an important feeding area for several species. MMS indicates that the birds identified in the FER constitute an important ecological, economic, and aesthetic resource within North Carolina's coastal zone. *See* FER III-238. Some of the species are either endangered or threatened. The cahow (endangered) may be found on the North Carolina OCS. Mobil Exhibit 27 at 6-28. Coastal endangered and threatened species that may be present in the project area include the peregrine falcon (endangered), bald eagle (endangered), piping plover (threatened), and the roseate tern (threatened). Mobil Exhibit 27 at 6-28.

The Fish and Wildlife Service (FWS) has stated that it is concerned about the potential indirect impacts of exploratory drilling on seabirds. Memorandum from Regional Director, FWS, Atlanta, to MMS Regional Director, Atlantic OCS Region, December 22, 1989, (Attachment Four to Mobil Exhibit 18). Of particular concern to the FWS is that the only known concentration of the rare black-capped petrel (*Pterodroma hasitata*) at sea occurs specifically in and around the drilling site, with numbers peaking in May, August, and late December through early

January. *Id.* The FWS also stated that black-capped petrel specimens have had high levels of mercury relative to other seabird species collected within the lease sale area. *Id.* The FWS recommended the establishment of a monitoring program.

In its FER, MMS identified the following possible adverse effects on birds. Birds could experience startle reactions from aircraft noise and vessel traffic. FER at IV-233. Specifically, since the bald eagle and piping plover are known to nest during the period proposed for exploration, aircraft noise between the drill site and the Michael J. Smith Field in Beaufort could cause adults to abandon the nest. FER at IV-234. MMS concluded, however, that this possible effect is unlikely given that, on the average, there will only be two aircraft flights per day. *Id.* MMS also states that there is no evidence that the helicopter flights will impinge on critical feeding areas. *Id.* As to possible effects from drilling muds and cuttings, MMS concluded that direct contact with, or contamination by, muds and cuttings are not considered likely for the Bermuda petrel, roseate tern, or other endangered species. *Id.* However, prey species of marine birds could be displaced and the prey-locating ability of predators could be diminished by the presence of mud particles in the water column. FER at IV-64.

Based on the evidence in the record, I find that for the purposes of this appeal there is adequate information on the possible effects of Mobil's proposed activity on birds, an important ecological, economic, and aesthetic resource within North Carolina's coastal zone. In considering the risk of potential impacts upon birds, I find that the individual and cumulative impacts of Mobil's proposed activity on birds will be minimal. In particular, I note that while the impacts on endangered or threatened species

could be great given their diminished numbers, the likelihood of impacts will be small given the nature and duration of possible impacts.

Air Quality

Activities associated with the drilling activity at the time of Mobil's waste discharges will emit air pollutants. *See* FER at IV-205. Upon reviewing the information in the record, however, I find that the information is adequate for me to conclude that there will not be any significant impacts (including cumulative impacts) on the State's air quality.

Water Quality

Mobil's proposed activity will have individual and cumulative effects on water quality near the drill site. Mobil claims, however, that its discharge activity would satisfy North Carolina's water quality criteria within 100 meters from the point of discharge, and that there would be no impact on the water quality of the State's coastal zone. Mobil's Initial Brief at 44; Mobil's Final Brief at 32. The State disputes Mobil's claims on water quality. J. Trevor Clements of the State DEM found that Mobil's Water Quality Table incorrectly lists five State Water Quality Concentration Limits. The State also argues that the Water Quality Table calculations are inadequate. State's Final Brief at 18. Furthermore, the State also points to the EPA draft 403(c) report to indicate that there are projected to be five violations of the State's water quality standards during Mobil's proposed final mud dump event.

MMS states that the effect of drilling discharges on offshore water quality has been the subject of numerous field monitoring programs. MMS Comments at 13. MMS

states that the expected effects of drilling effluent on water quality are short-term, minor, and that water quality parameters are anticipated to return to background concentrations within a few hundred meters of the point of discharge. MMS Comments at 15. MMS predicts that there will be no impact on water quality of the State's coastal zone. Other agencies offered few specific comments on the proposed project's effects on water quality.

Upon reviewing the information in the record, I find that the information is adequate for me to conclude that there will be no significant impacts (including cumulative impacts) on the State's water quality, given the location of the activity and the dynamic current regime.

Socioeconomic Effects

Having previously considered the effects of the proposed project on the resources of the coastal zone which in turn affect the coastal uses,[67] in this section I will focus on other possible adverse effects of the proposed project on uses of the State's coastal zone.[68] Important economic activities in the State's coastal zone include agriculture, tourism, recreation, forestry, and commercial fishing. FER at III-313-315.

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[67] Natural resource damage valuation is based in part on the value of the uses of those resources. *See, e.g.*, Oil Pollution Act § 1006(d), 33 U.S.C. § 2706(d).

[68] The MMS states that North Carolinians living in eastern North Carolina in general have "fewer job opportunities, greater unemployment, higher levels of dependency, and lower incomes than North Carolinians living elsewhere in the State." FER at III-297. I will consider these comments when assessing the extent to which Mobil's proposed project furthers the national interest in economic development.

The primary coastal use at issue in this case is the commercial and recreational fishing industry.[69] The proposed exploration area contains important concentrations of epipelagic, bluewater fish and The Point is one of the most productive offshore fishing grounds along the east coast. *See* FER at III-83. Over the year, The Point is the most frequently and intensively fished area by the Oregon Inlet charter boats, private recreational and commercial bluewater fleet. The area's reputation for large blue marlin has prompted several local billfish tournaments. The fishing industry may be affected by space use conflicts, both from drillship activities and increased vessel traffic.[70] The drillship will be in place for approximately 114 days between May and October. This time period coincides with much of the fishing season. FER at IV-217. During this time period there could be as many as 100-125 boats engaged in fishing near The Point and the drill site.[71]

In commenting on this appeal, Federal agencies differed in their assessment of the potential effects on the fishing industry. MMS concludes that impacts on the fishing industry are expected to be low. FER at IV-219. MMS stated that interference from the placement of drillship anchors would be minimized by the placement of surface buoys and a notice to mariners. MMS Comments at 38. MMS also concluded in its FER that interference from

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[69] The fourth part of the State's proposed study would be documentation of the commercial and recreational fishing in the vicinity of the drill site and The Point. This part of the study would be accomplished by surveying commercial and recreational fishermen on specific days upon returning to various ports in North Carolina. The information obtained, along with some field data, would be used to document the importance of the area as a fishery.

[70] *See also* discussion, *supra* at 24.

[71] Testimony of John Bayless, Oregon Inlet Sportfishing Guides Association (State Exhibit 26-A).

support vessel traffic would be minimal. *See* FER at IV-242-243.

I agree that the space use impacts will be temporary in that they are scheduled to last for about 114 days. There is unrefuted evidence that the fishing industry seasonally concentrates near the drill site, however, indicating that there will be a high likelihood of impacts. I find, however, that the potential extent of those space use impacts will be minor given that Mobil plans to drill only one exploratory well. In evaluating the information in the record, I therefore find that the information is adequate for me to conclude that the space use impacts upon the fishing industry will be minor.

The ESRP concludes that, in general, socioeconomics is the most neglected area in the primary documents dealing with exploratory drilling at the Manteo site. *See* ESRP Report at 58. The ESRP made a number of general comments on the inadequacy of existing socioeconomic information. *See* ESRP Report at 59-60. Furthermore, the ESRP recommends that a base case characterization analysis, community studies, studies on aesthetic and perceptual issues, studies on infrastructure, and a socioeconomic monitoring study should be initiated as soon as possible, especially since these studies were not done at the leasing phase. *See* ESRP Report at 61-63.

Upon reviewing the information in the record of this appeal, I am unable to adequately identify the extent of the individual and cumulative adverse socioeconomic effects resulting from Mobil's proposed activity. Given that this is a frontier area and an area of rich natural resources upon which the State heavily depends, socioeconomic impacts must be more fully addressed.

Conclusion on Adverse Effects

I have evaluated the information in the record on adverse effects of Mobil's proposed drilling discharges on the natural resources and uses of the State's coastal zone. I found that the planned drilling discharges will have adverse effects on the resources and uses of the State's coastal zone. In particular, I found that the proposed discharges will affect the benthic environment, which is linked to the State's fisheries. Moreover, based on a review of the record, I have identified informational concerns sufficient that I am unable to adequately assess the risk of impacts of Mobil's proposed activity, and so, I am unable to adequately identify the individual and cumulative adverse effects of Mobil's proposed activity.

I note that the NRC stated in its 1989 report that "[t]he basic information needed to make a leasing decision anywhere includes a characterization of the environment, identification of the biological resources at risk, and a basic understanding of ecological relationships." NRC 1989 Report at 5. Even at this post-leasing stage, I find that Mobil has not adequately documented the biological resources or ecological relationships at risk. While the overall likelihood of impacts may be low, to say that the models of a worst case scenario obviate the need to understand any ecological relationships between the State's fish resources and the *Sargassum* or benthic communities is too facile an explanation for me to accept, given that the potential extent of impacts may be high.

Furthermore, the 1989 NRC report indicates that where unique habitats and endangered and rare species exist, more extensive characterization of the sensitivity of biota to OCS-related activities, characterization of recovery rates, and identification of mitigating measures is needed. NRC 1989 Report at 5. I am persuaded that the biological

resources of the drill site area are sufficiently rich and unique to merit further investigation. I am also persuaded that the fisheries located at the site are an important part of the State's coastal zone, and that there may be potential risks of contamination of sensitive fish larvae. I find that Mobil has not adequately accounted for the effects of reasonably foreseeable effects resulting from increased currents or adverse weather conditions. I am persuaded that the ecological relationship of the benthic environment to the State's fisheries must be further assessed in order to adequately evaluate the risk of impact of Mobil's proposed activities. Finally, I find that Mobil has not adequately assessed the risk of its impacts on the socioeconomic uses of the State's coastal zone.

b. *Contribution to the National Interest*

The national interests to be balanced in Element 2 are limited to those recognized in or defined by the objectives or purposes of the CZMA. *See* Korea Drilling Decision at 16. Since our national interests are not static, however, the Secretary has noted that there are several ways to determine the national interest in a proposed project, including seeking the views of Federal agencies, examining Federal laws and policy statements from the President and Federal agencies, and reviewing plans, reports and studies issued by the Federal agencies. *See* Decision and Findings in the Consistency Appeal of Union Oil Company of California, (Union Decision), November 9, 1984, at 15. These sources of information can assist the Secretary in determining the current national interest in a proposed project.

I conclude that the national interest contribution of Mobil's proposed drilling discharges is minimal.

Energy self-sufficiency through oil and gas production is a recognized goal of the CZMA and the Secretary has previously held that it furthers the national interest under this Element. *See* Exxon SRU Decision at 11. Moreover, the record of this appeal indicates that energy self-sufficiency continues to be in the national interest. Of those Federal agencies that commented on the issue of the national interest in the Appellant's proposed activity, most expressed support for domestic energy projects. The DOI states that "[s]uch an important discovery, as the Manteo Prospect may represent, is an essential component in maintaining our self-sufficiency in clean burning, environmentally safe natural gas." DOI Comments. In § 6003 of the Oil Pollution Act of 1990, however, Congress found that the Outer Banks is an area of "exceptional environmental fragility and beauty" and that there are concerns about the adequacy of the scientific and technical information underlying oil and gas exploration decisions in this area. *See* 33 U.S.C. § 2753(b). Based upon a review of the record, I find that there is a national interest in the *informed* exploration for natural gas resources at this site. Potential risks must be fully evaluated.

The State argues, however, that the national interest issue is limited by the scope of the activity, and that Mobil's drilling proposal is not the subject of this appeal. State's Initial Brief at 6-7. I agree. However, Mobil's proposed discharges are a part of Mobil's drilling proposal, and a portion of the national interest contribution of the proposed one-well OCS exploration can be imputed to Mobil's proposed drilling discharges.

In order to perform the required balancing for Element 2, I must also identify the *extent* of the activity's contribution to the national interest. To identify the extent of the national interest contribution of Mobil's one-well drilling

proposal, in this case, I will consider the potential size and likelihood of natural gas recovery as well as the degree to which the proposal is based on informed decision-making, such that potential risks have been fully evaluated.[72] As evidenced by comments from MMS and the DOI, exploration could result in the recovery of five trillion cubic feet of natural gas.[73] I find that there is a potential for a large discovery.[74] The State requests that I consider the lack of in-place infrastructure when taking into consideration the probability that natural gas can be recovered at the site. State's Final Brief at 46. Given that I have found that if natural gas is discovered it will probably be in a large amount, I find that the size of the discovery will outweigh the costs of bringing the natural gas to market. As to the likelihood of a natural gas discovery, in its comments on this appeal, MMS has stated:

> Without a discharge permit, even drilling a single exploratory well on the Manteo Prospect, with estimates of hydrocarbon resources as great as 1 billion barrels of oil equivalent in the form of 5 trillion cubic feet (tcf) of natural gas, would have to be questioned given that *the chance of encountering hydrocarbons is only 10 percent or less.* (Emphasis added.)

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72 The parameters influencing contribution to the national interest will depend on the facts of each case.

73 MMS geologists characterize the five trillion cubic feet estimate as optimistic. FER at II-6.

74 While the estimated potential hydrocarbon reserve would be found under approximately 21 lease blocks, Mobil's POE covers only one well in one lease block. *See* Mobil's Initial Brief at 8; Mobil's POE, vol. 1 at A1-4, A1-9. The MMS states that production of five trillion cubic feet of natural gas would involve the drilling of approximately 103 wells. FER at IV-13.

MMS Comments at 8. Accordingly, there is a 90 percent chance that no hydrocarbons will be found, a small likelihood of discovery.

Informed exploration is in the national interest, however, even if there is no discovery of hydrocarbons.[75] In this case, pursuant to § 6003 of the Oil Pollution Act in which Congress noted the importance of informed decision-making in this area, the ESRP concluded that adequate information is lacking for even an informed leasing decision, let alone an informed decision to explore. I therefore find that Mobil's drilling proposal contributes less to the national interest because it contains informational deficiencies as identified by the ESRP.

Above, I found that the potential size of the discovery is large. However, there is a 90 percent chance that no hydrocarbons will be discovered at the site and that Mobil's drilling proposal contributes less to the national interest because it contains informational deficiencies as identified by the ESRP. Based upon a review of the record, I find that Mobil's proposed one-well OCS exploration would make a minor contribution to the national interest.

The activity at issue in this case, however, is Mobil's proposed discharges. Based upon a review of the record, I find that the proposed discharges are a small part of Mobil's overall one-well exploration activity at Manteo Area Block 467, and that these discharges contribute proportionately less to the national interest than does Mobil's drilling proposal. In considering these factors I now find that Mobil's proposed discharges contribute minimally to the national interest.

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75 Whether or not gas will be discovered, the exploration itself furthers the national interest by ascertaining information on available hydrocarbon reserves. *See* Texaco Decision at 30-31; Amoco Decision at 45.

c. *Balancing*

I have evaluated the information in the record on adverse effects of Mobil's proposed drilling discharges on the natural resources and uses of the State's coastal zone. I found that the planned drilling discharges will have adverse effects on the resources and uses of the State's coastal zone. In particular, I found that the proposed discharges will affect the benthic environment, which is linked to the State's fisheries. Moreover, based on a review of the record, I have identified informational concerns sufficient that I am unable to adequately assess the risk of impacts of Mobil's proposed activity, and so, I am unable to adequately identify the individual and cumulative adverse effects of Mobil's proposed activity.

I have evaluated the information in the record on the contribution of the proposed activity to the national interest. I found that the proposed discharges contribute to the national interest by furthering Mobil's one-well exploration plan. I found, however, that the national interest contribution of Mobil's proposed drilling discharges is minimal.

Because I cannot adequately identify the extent of the individual and cumulative adverse effects of the proposed activity, I am unable to perform the required balancing of the adverse effects against the contribution to the national interest. Consequently, I cannot find that the national interest benefits of Mobil's proposed activity outweigh the proposed activity's adverse effects on the State's coastal resources and uses.

3. *Element 3: Activity Will Not Violate The Clean Water Act or the Clean Air Act*

To satisfy the third Element of Ground I, I must find that "[t]he activity will not violate any of the requirements

of the Clean Air Act, as amended, or the Federal Water Pollution Control Act, as amended." 15 C.F.R. § 930.121 (c). The requirements of the Clean Air Act and the Federal Water Pollution Control Act are incorporated into all State coastal programs approved under the CZMA § 307(f). I conclude that the activity meets the requirements of the Clean Water Act and the Clean Air Act, and therefore satisfies Element 3 of Ground I.

a. *Clean Water Act*

Sections 301(a) and 402 of the Federal Water Pollution Control Act (Clean Water Act or CWA), 33 U.S.C. §§ 1311(a) and 1342, provide that the discharge of pollutants is unlawful except in accordance with an NPDES permit issued by the EPA. Mobil submitted its application for an NPDES permit to the EPA on August 18, 1989.

EPA must prescribe appropriate terms and conditions in an NPDES permit for discharges associated with OCS activities. In its comments on this appeal, EPA stated:

> Compliance with all conditions of the NPDES permit, if consistency is resolved and the permit issued, would meet the requirements of the Clean Water Act applicable to point source discharges. Therefore, assuming that Mobil will not discharge until they have obtained a permit, the project will not be in violation of the Clean Water Act, as amended.

EPA Comments. EPA has confirmed in its comments in earlier override appeals that an OCS facility operated in compliance with an NPDES permit would satisfy the requirements of the CWA. *See, e.g.*, Korea Drilling Decisions at 10. Conversely, a project not operating in compliance with the terms of an NPDES permit would not meet the requirements of the CWA applicable to point source discharges.

In spite of Mobil's statements to the contrary,[76] Mobil cannot lawfully conduct its proposed activity without meeting the terms and conditions of an NPDES permit, thus meeting the standards of the Clean Water Act. Therefore, I find that Mobil's proposed activity will not violate the requirements of the Clean Water Act.

b. *Clean Air Act*

Sections 108 and 109 of the Clean Air Act, as amended (CAA), 42 U.S.C. §§ 7408 and 7409, direct the EPA to prescribe national ambient air quality standards (NAAQS) for air pollutants to protect the public health and welfare. Pursuant to CAA § 110, 42 U.S.C. § 7410, each state in turn is required to develop and enforce an implementation and enforcement plan for attaining and maintaining the NAAQS for the air mass located over the state.

Mobil states that due to the distance of the drill site from the nearest land, the onshore effects of drilling emissions are negligible, and that emissions from both the onshore and offshore facilities are estimated in accordance with EPA standards and guidelines.[77] Mobil's Initial Brief at 46; Mobil's Final Brief at 38. The State has commented that "[s]ince Clean Air Act issues have not been raised in this appeal, the Secretary's attention should be devoted to whether Mobil has established in the record that its proposed drilling discharges will not violate any require-

[76] Mobil has stated that the proposed cadmium and mercury limits would present serious compliance problems, and that these limits cannot be consistently achieved. *See* Mobil Exhibit 18 at 58.

[77] 30 C.F.R. § 250.33(a). Total estimated emissions from both the onshore and offshore facilities fall below the calculated regulatory exemption levels set forth in 30 C.F.R. § 250.45. Mobil's POE, vol. 1 at B19-1—B19-6.

ments of the Clean Water Act." State's Initial Brief at 35. In its comments on this appeal, EPA states that the onshore impact would not violate any current requirements set under the Clean Air Act.[78] Based upon a review of the record, I find that Mobil's proposed marine discharge activities under an NPDES permit will not violate the CAA.

4. *Element 4: No Reasonable, Consistent Alternatives Available*

To meet the requirements of the fourth Element of Ground I, I must find that "[t]here is no reasonable alternative available (*e.g.*, location, design, etc.) which would permit the activity to be conducted in a manner consistent with the [state's coastal] management program." 15 C.F.R. § 930.121(d). For state objections based on 15 C.F.R. § 930.64(b), the fourth Element of Ground I is usually decided by evaluating the alternative(s) proposed by a state in the consistency objection. *See* Chevron Decision at 58; LILCO Decision at 16. In this case, however, the State's objection to Mobil's proposed drilling discharges is based on a lack of information necessary to determine the consistency of the activity. *See* 15 C.F.R. §§ 930.64(d).

I find that there is no reasonable, available alternative to Mobil's proposed drilling discharges which would permit Mobil to conduct the activity in a manner consistent with the State's coastal management program.

In terms of alternatives, § 930.64(d) imposes different requirements upon a state than does § 930.64(b)(2).

[78] Letter from Richard E. Sanderson, Director, Office of Federal Activities, Environmental Protection Agency, to Gray Castle, Deputy Under Secretary for Oceans and Atmosphere, Department of Commerce, December 14, 1990 (EPA Comments).

Under § 930.64(d) "the objection must describe the nature of the information requested and the necessity of having such information to determine the consistency of the activity with the management pogram."[79] Unlike § 930.64(b)(2), § 930.64(d) does *not* require a state to describe in its objection "alternative measures (if they exist) which, if adopted by the applicant, would permit the proposed activity to be conducted in a manner consistent with the management program." If a state lacks information necessary to assess a proposed activity, it would likely lack information necessary to assess possible alternatives to an activity.

Nevertheless, in this case the State indicated in its objection letter that the only alternative available is for Mobil to provide the information needs identified in the proposed four-part fisheries study. State Objection Letter. The State continued: "Should Mobil subsequently provide the required information, the State will then be in a position to review the proposed activity to determine whether it may be conducted in a manner consistent with North Carolina's Coastal Management Program." State Objection Letter. Since the information is allegedly necessary to a consistency determination, however, the State cannot determine the probable consistency of the activity prior to the submission of the information by Mobil. I find that the State's suggested alternative of a four-part fisheries study is not a reasonable alternative available which would permit the activity to be conducted in a manner consistent

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79 Section 930.64(d) does not require the Appellant to first gather information on reasonable alternatives for presentation to the State for a probable consistency determination, as suggested by the State. *See* State's Initial Brief at 38. It would be incongruous to require an Appellant to provide evidence of a reasonable alternative to a State, only to require the Appellant, on appeal, to prove the unreasonableness of the alternative.

with the State's coastal management program because there is no indication by the State of the probable consistency of Mobil's proposed activity upon submission of the additional information. *See also* Chevron Decision at 51.

In reviewing the record of this appeal, I have identified two possible alternatives that may be reasonable and available. First, in its briefing for the appeal the State argues that a no-discharge NPDES permit is a reasonable alternative that could allow exploratory drilling to go forward while additional information is gathered through monitoring studies. State's Initial Brief at 39. The State asserts, however, that the consistency of this alternative would depend on identification of a suitable disposal site. State's Initial Brief at 39. The barging proposal therefore fails to qualify as an alternative because the State does not indicate whether barging would probably be consistent with the State's CMP since the proposal's consistency is dependent upon identification of a suitable disposal site. Second, the State makes a reference in its initial brief to possible relocation of Mobil's drilling site. State's Initial Brief at 39. The State claims, however, that "without additional information on the biological resources located in other potential discharge areas, acceptable alternative sites cannot presently be properly evaluated." State's Initial Brief at 39. The possible relocation of Mobil's drilling site fails to qualify as an alternative for two reasons. First, the description is too general in nature since the State did not identify the location of an alternative site. *See* Texaco Decision at 36; Korea Drilling Decision at 24. Second, the State does not indicate whether an alternative site would probably allow Mobil to conduct drilling discharges consistent with the State's CMP.

The record for this appeal discloses no reasonable, available alternatives. If such alternatives existed, the State

would likely offer them even though not required to do so for objections made pursuant to 15 C.F.R. § 930.64 (d). Element 4 requires that alternatives be consistent with state CMPs, and a state is in the best position to evaluate the consistency of a possible alternative. Therefore, based on the record before me, I find that there is no reasonable, available alternative to Mobil's proposed drilling discharges which would permit Mobil to conduct the activity in a manner consistent with the State's coastal management program.

Conclusion for Ground I

Based on the findings above, I find that Mobil has not satisfied the second Element of Ground I. Therefore, Mobil's proposed drilling discharge activity is not consistent with the objectives or purposes of the CZMA.

B. *Ground II: Necessary in the Interest of National Security*

I conclude that the proposed activity is not necessary in the interest of national security.

The second statutory ground for an override of a state's objection to a proposed activity is based on a finding that an activity is necessary in the interest of national security. To make this determination I must find that "a national defense or other national security interest would be significantly impaired if the activity were not permitted to go forward as proposed." 15 C.F.R. § 930.122.

Again, it is important to identify the scope of the activity; it is the discharge of drilling wastes, a part of Mobil's proposed one-well OCS exploration for natural gas. As with the contribution to national interest, part of the contribution of Mobil's OCS gas exploration to the national

security can be imputed to Mobil's proposed drilling discharges.

Mobil asserts that decreased reliance on oil imports contributes to the national defense and national security and that exploration is a necessary step in the development of new domestic reserves. Additionally, Mobil contends that there are few large oil and gas reserves to be found,[80] and that the size of the potential natural gas reserve in this area would make it exploration important for national security reasons. Mobil's Final Brief at 62.

In order to decide this ground, I will give considerable weight to the views of the Department of Defense (DOD) and other Federal agencies. 15 C.F.R. § 930.122. In soliciting the views of several Federal agencies, the Deputy Under Secretary asked those agencies to identify any national defense or other national security objectives directly supported by Mobil's drilling discharge activities, and to indicate which of the identified national defense or other national security interests would be significantly impaired if Mobil's activity were not allowed to go forward as proposed.

The DOD responded by stating that even if five trillion cubic feet of natural gas are found,

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[80] I agree with Mobil that our nation's security interests are not static. *See* Mobil's Initial Brief at 65. I note, however, that our nation's concern for energy independence from foreign sources of oil has been longstanding, as exemplified by President Nixon's announcement on November 7, 1973, of "Project Independence.' *See* 9 Compilation of Presidential Documents 1309 (1973), *cited in State of Alaska v. Andrus*, 580 F.2d 465, 467 n.1 (D.C. Cir.), *vacated in part sub nom, Western Oil & Gas Assoc. v. State of Alaska*, 439 U.S. 922 (1978). Moreover, the Secretary has previously held that the size of oil and gas reserves is not determinative of whether the requirements of this ground are met. The degree of importance the Secretary assigns the size of oil and gas reserves in deciding whether interests are significantly impaired depends on the facts of the case. Chevron Decision at 71.

> it is not possible to establish a direct impact on the Department of Defense (DoD) (Ground II) from a natural gas exploration project. Therefore, DoD is unable to identify a basis for a determination that the national defense or national security interest would be significantly impaired if the proposed consistency certification were not granted.[81]

Mobil discounts the DOD comments by stating that DOD misunderstood the grounds for a Secretarial override. Mobil's Final Brief at 57, n.60. Nevertheless, I interpret DOD's comments to mean that in the opinion of DOD, national security interests would not be significantly impaired if the project were not allowed to go forward as proposed.

Other Federal agencies support the general proposition that OCS exploration contributes to national security interests. The DOE stated that "[p]roducible oil and gas reserves in the Atlantic Outer Continental Shelf (OCS) can help this country replace imports, thereby meeting both energy and economic security and national defense goals. However, when environmentally benign exploitation such as that proposed by Mobil is blocked, this option is lost." DOE Comments. The DOE continues:

> Neither our domestic nor foreign policy should be subject to the availability of imported oil especially when the opportunity exists to develop domestic natural gas resources that can replace important [sic] oil. Consequently, we believe that this project is necessary in the interest of national security.

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[81] Letter from Diane K. Morales, Deputy Assistant Secretary (Logistics), Department of Defense, to Gray Castle, Deputy Under Secretary for Oceans and Atmosphere, Department of Commerce, November 27, 1990.

Id. The NSC stated that it is in the national security interest to increase domestic oil production where such production is economic and consistent with environmental procedures.[82] The Department of the Treasury recognizes significant benefits to national security from domestic energy resources.[83] The DOI states that there is a direct relationship between national security and the success of the Federal program to develop offshore energy resources. DOI Comments. I find that none of these comments specifically address how these interests would be "significantly impaired" if Mobil's proposed marine discharge of drilling wastes is not allowed to proceed "as proposed."

MMS commented, however, that denial of an NPDES permit application for Mobil's proposed drilling discharges "could well foreclose any possibility of future oil and gas exploration in frontier areas of the OCS." MMS Comments at 63; *see also* MMS Comments at 9. MMS also commented:

> Prohibition of the proposed activity would result in a *direct and significant impairment* of the potential for discovery of a *natural gas field of such magnitude* that national security and defense concerns could be *significantly* compromised.

MMS Comments at 65 (emphasis in original). I decline to give much weight to MMS' comment on significant impairment, however, because its comment appears to be based on speculation that denial of this NPDES permit

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[82] Memorandum from William F. Sittmann, Executive Secretary, National Security Council, to Michael P. Skarzynski, Chief of Staff, Department of Commerce, December 11, 1990.

[83] Letter from Bruce R. Bartlett, Deputy Assistant Secretary, Office of Economic Policy, Department of the Treasury, to Gray Castle, Deputy Under Secretary for Oceans and Atmosphere, Department of Commerce, November 13, 1990.

application could well foreclose any possibility of future oil and gas exploration in frontier areas of the OCS. The record of this appeal does not disclose that this case is a referendum on future oil and gas exploration in frontier areas of the OCS.

Conclusion for Ground II

Since Mobil's proposed discharges are a part of Mobil's proposed one-well exploration, a portion of the national security value of the exploration may be imputed to the discharges. However, I find that the comments of the Federal agencies fail to persuade me that a national defense or other national security interest would be significantly impaired if Mobil were not permitted to discharge its wastes as proposed. Therefore, based on the record before me, I now find that the requirements for Ground II have not been met.

V. CONCLUSION AND SCERETARIAL DECISION

I have found that Mobil's proposed discharges of drilling wastes are neither consistent with the objectives of the CZMA nor necessary in the interests of national security. Accordingly, I decline to override North Carolina's objection to Mobil's proposed discharges of drilling wastes.

/s/ David Barr
for Ronald H. Brown
Secretary of Commerce

September 2, 1994

[DOI Logo]

UNITED STATES DEPARTMENT OF THE INTERIOR

MINERALS MANAGEMENT SERVICE
Gulf of Mexico OCS Region
1201 Firewood Park Boulevard
New Orleans, Louisiana 70125-2394

Nov. 9, 1994

In Reply Refer To: MS 5322

Mobil Exploration & Production U.S. Inc.
Attention: Ms. Leslie J. Burton
1250 Poydras Plaza
New Orleans, Louisiana 70113-1892

Gentlemen:

Pursuant to Minerals Management Service (MMS) letter dated October 9, 1992, a suspension of operations (SOO) was issued for the 21 leases in the Manteo Unit, Agreement No. 752-290001-0, offshore North Carolina. The letter states that the SOO will expire when the two studies recommended by the Environmental Sciences Review Panel have been accepted by the MMS and when the U.S. Department of Commerce renders a decision on the appeals from the State of North Carolina's Denial of Consistency Certification on the Exploration Plan and the NPDES Permit.

By letter dated July 22, 1994, the MMS transmitted the two aforementioned studies to the Department of Commerce, and on September 2, 1994, the Secretary of Commerce issued a decision upholding North Carolina's objection to your proposed Exploration Plan. This letter provides formal notice that the suspensions for the 21 leases in the Manteo Unit are hereby terminated.

Rental payments for the 21 leases will be calculated from November 10, 1994. The terms of the leases will be extended for a period of time equal to the period the suspension was in effect (30 CFR 250.10(f)). The leases and the new expiration dates are as follows:

Lease	Date	Lease	Date
00225	11/9/96	00236	11/9/96
00226	11/9/96	00237	11/9/96
00227	11/9/96	00238	11/9/96
00228	11/9/96	00239	11/9/96
00229	11/9/96	00240	11/9/96
00230	11/9/96	00242	11/9/96
00231	11/9/96	00243	11/9/96
00232	11/9/96	00244	11/9/96
00233	11/9/96	00446	11/24/97
00234	11/9/96	00448	11/24/97

If you have any questions, please call Mr. Ralph Melancon at 736-2675.

Sincerely,

/s/ Chris C. Oynes
CHRIS C. OYNES
Acting Regional Director

[Filed Jul. 24, 1997]

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

(Caption Omitted in Printing)

JUDGMENT
[Pursuant to Rule 54(b)]

Pursuant to the court's Order Directing Entry of Partial Judgment and Memorandum Concerning Final Pre-Trial Conference, filed July 18, 1997, stating that there is no just reason for delay and directing the entry of judgment, as provided for in Rule 54(b),

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that partial judgment is is [sic] entered in favor of the plaintiff MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC. in the amount of $78,257,565.00. Pursuant to RCFC 54(d), costs shall be allowed to said plaintiff ("the prevailing party").

DAVID A. LAMPEN
Clerk of Court

By: /s/ [Illegible]
Deputy Clerk

July 24, 1997

[Filed Jul. 24, 1997]

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

(Caption Omitted in Printing)

JUDGMENT

Pursuant to the court's Order Directing Entry of Final Judgment, filed July 18, 1997.

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 54, that judgment is entered in favor of plaintiff, MARATHON OIL COMPANY, in the amount of $78,242,368.59. Pursuant to RCFC 54(c), costs shall be allowed to said plaintiff ("the prevailing party"). [As all other counts in this civil action have been addressed, present judgment, now entered on the above captioned plaintiffs, concludes this litigation.]

DAVID A. LAMPEN
Clerk of Court

By: /s/ [Illegible]
Deputy Clerk

July 24, 1997

DEC 30 1999

Nos. 99-244 and 99-253

Supreme Court, U.S.
FILED
DEC 30 1999
CLERK

IN THE

Supreme Court of the United States

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MARATHON OIL COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF PETITIONER MARATHON OIL COMPANY

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59pp

QUESTION PRESENTED

Whether the United States, after having accepted consideration from a government contractor, is required to return that consideration (*i.e.*, pay restitution) when subsequent government action bars the United States from performing its contractual obligations.

PARTIES TO PROCEEDING BELOW AND RULE 29.6 STATEMENT

In addition to petitioner, Mobil Oil Exploration & Producing Southeast, Inc., was a plaintiff-appellee below. The following parties were plaintiffs, but not appellees, below:

Conoco, Inc.,
Amerada Hess Corporation,
Chevron USA, Inc.,
Murphy Exploration & Production Co.,
Murphy Oil USA, Inc.,
OXY USA, Inc.,
Pennzoil Exploration & Production Co., and
Shell Offshore, Inc.

Pursuant to Rule 29.6, Marathon Oil Company states that its parent company is USX Corporation. The following are subsidiaries of Marathon Oil Company that are not wholly owned:

Arctic LNG Transportation Company,
Colonial Pipeline Company,
Eagle Sun Company Limited,
Explorer Pipeline Company,
Kenai LNG Corporation,
Marathon Ashland Petroleum LLC,
Odyssey Pipeline L.L.C.,
Oil Insurance Limited,
Polar LNG Shipping Corporation,
Poseidon Oil Pipeline Company, L.L.C.,
West Shore Pipe Line Company, and
Wolverine Pipe Line Company.

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IN THE
Supreme Court of the United States

Nos. 99-244 and 99-253

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,
v.
MARATHON OIL COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF PETITIONER MARATHON OIL COMPANY

OPINIONS BELOW

The superseding opinion of the Court of Federal Claims (Pet. App. 45a-99a)[1] granting petitioners' motion for partial summary judgment as to liability is reported at 35 Fed. Cl. 309. The judgments of the Court of Federal Claims in favor of petitioners (J.A. 339-40) are unreported. The original opinion of the United States Court

[1] Citations of "Pet. App." refer to the appendices to the petition filed in No. 99-253.

of Appeals for the Federal Circuit (Pet. App. 25a-43a) reversing the judgment of the Court of Federal Claims was entered on October 15, 1998, and is reported at 158 F.3d 1253. The court of appeals granted panel rehearing and entered a revised order and opinion (Pet. App. 1a-24a) on May 13, 1999, which is reported at 177 F.3d 1331.

JURISDICTION

The court of appeals entered its original decision on October 15, 1998. On November 25, 1998, petitioners timely filed a petition for rehearing and suggestion for rehearing *en banc*. The court granted panel rehearing and entered a revised judgment on May 13, 1999. Petitioners timely filed petitions for writs of certiorari on August 10 (No. 99-244) and August 11, 1999 (No. 99-253), which this Court granted on November 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved in this case are (1) the Outer Continental Shelf Lands Act of 1953, ch. 345, 67 Stat. 462 (codified as amended at 43 U.S.C. § 1331 *et seq.*), (2) the Outer Banks Protection Act, Pub. L. No. 101-380, § 6003, 104 Stat. 484, 555-58 (1990), and (3) the Coastal Zone Management Act, 16 U.S.C. § 1456, which are reproduced in pertinent part at Pet. App. 100a-158a, 159a-165a, and 166a-173a, respectively.

STATEMENT OF THE CASE

This case is a contract dispute between petitioners Marathon Oil Co. ("Marathon") and Mobil Oil Exploration and Producing Southeast, Inc. ("Mobil") and the United States. In 1981, petitioners each paid the United States more than $78 million for interests in oil and gas

leases that gave them "the exclusive right and privilege to drill for, develop, and produce oil and gas resources" on five tracts off the coast of North Carolina. Pet. App. 175a (§ 2) (sample lease). In exchange, the United States contractually obligated itself to timely and fairly consider petitioners' requests for its approval of plans and applications necessary for them to explore and develop their lease tracts. In 1990, the United States enacted the Outer Banks Protection Act ("OBPA"), Pub. L. No. 101-380, § 6003, 104 Stat. 484, 555-58 (1990), which, the Court of Federal Claims found, not only repudiated the government's obligations under petitioners' leases, but also "compelled governmental breach by non-performance." Pet. App. 76a. The court of appeals did not address these findings, but nevertheless denied petitioners' claim for restitution of the money they had paid. The court of appeals reasoned that, even though the OBPA had barred the United States from performing its contractual obligations, the statute was not the "operative cause," *id.* at 4a, of the contract's failure. *Id.* at 14a-15a. The question presented for resolution by this Court is whether the United States, after having bargained for and received consideration from a government contractor, is required to pay restitution when its own acts subsequently bar it from performing its contractual obligations.

1. *Petitioners' Outer Continental Shelf Lands Act Leases.*

The Outer Continental Shelf Lands Act of 1953 ("OCSLA"), ch. 345, 67 Stat. 462 (codified as amended at 43 U.S.C. § 1331 *et seq.*), establishes federal jurisdiction over the seabed and subsoil of the continental shelf lying more than three miles from the coast of the United States ("OCS lands"). See 43 U.S.C. § 1333(a). The OCSLA further authorizes the Secretary of the Interior ("the Secretary") to sell leases to private parties to explore for and develop oil and gas deposits on those lands.

See *id.* § 1337. Those leases "entitle the lessee to explore, develop, and produce the oil and gas contained within the lease area," subject only to the lessee's compliance with the OCSLA and regulations promulgated thereunder. *Id.* § 1337(b)(4).

Under the OCSLA, leases for tracts of OCS land are sold by the Department of the Interior ("DOI") through a competitive bidding process. See *id.* § 1337(a)(1). The winning bidders in this process are required to pay large, up-front, cash "bonuses" as well as annual lease payments for their leases and—if production is ever achieved—royalites on any oil or gas produced. See *Watt* v. *Energy Action Educ. Found.*, 454 U.S. 151, 168-69 (1981) (upholding DOI's up-front, cash "bonus" system). Since OCSLA's enactment in 1953, over 19,000 OCS leases have been sold and successful bidders have paid more than $60.7 billion in "bonuses" to the United States for the right to explore their tracts and develop any oil and gas deposits they find. See Minerals Management Serv., U.S. Dep't of the Interior, *Mineral Revenues 1998*, at 51 (1999).

In August 1981, petitioners Marathon and Mobil, along with Amerada Hess Corporation,[2] each purchased one-third undivided interests in oil and gas leases for five OCS tracts off the coast of North Carolina. See Pet. App. 6a-7a. Under these leases, petitioners acquired "the exclusive right and privilege to drill for, develop, and produce oil and gas resources, except helium gas" on their OCS tracts. *Id.* at 175a (§ 2). In exchange, petitioners each paid more than $78 million to the United States in up-front, cash "bonuses." *Id.* at 7a. Subsequently, petitioners each

[2] Amerada Hess Corporation settled its claims against the government in 1996, before the Court of Federal Claims entered judgment in this case, *see* Pet. App. 9a-10a, and was not a party to the proceedings before the court of appeals.

paid more than $264,000 in total rental payments to the United States during the leases' ten-year primary term. *Id.* at 7a.

Each of the lease agreements between petitioners and the United States was a non-negotiable, standard-form contract prepared by the DOI. See Pet. App. 174a-192a. Section 1 of each lease expressly provided that it was issued "pursuant to" and "subject to" the OCSLA, see *id.* at 175a, and thereby incorporated the provisions of OCSLA by reference. As the Court of Federal Claims found (and the court of appeals did not dispute), by entering into these leases, the United States contractually obligated itself to comply with the requirements of the OCSLA. See *id.* at 76a. In particular, the government assumed the contractual duty to "timely and fairly consider—not necessarily approve, but at least promptly consider—" the plans and permit applications necessary for petitioners to explore and develop their OCS lease tracts. *Id.*[3] "Otherwise," the court concluded, "the bargain between the [United States] and [petitioners] would be illusory and would permit [the government's] unilateral forfeiture of [petitioners'] lease bonuses with impunity." *Id.* at 57a; *accord id.* at 76a.

[3] The leases also reiterated the pre-existing requirement of the OCSLA that, in exploring and developing their OCS tracts, the lessees "comply with all regulations and orders relating to exploration, development, and production." Pet. App. 178a (§ 10). Under the OCSLA, exploration, development, and production may be conducted only pursuant to plans approved by the DOI. *See* 43 U.S.C. § 1340(b), (c)(1) (exploration); *id.* § 1351(b) (development and production). As the Court of Federal Claims found, by requiring petitioners to comply with the OCSLA and regulations promulgated thereunder, the leases imposed on the United States the "necessary reciprocal obligation" also to comply with the OCSLA when acting on petitioners plans. *See* Pet. App. 76a.

2. *The Outer Continental Shelf Lands Act Regulatory Scheme.*

When a lease tract is not adjacent to known deposits of oil or gas, the first step in developing an OCS lease is the preparation and submission to the Secretary of a plan of exploration ("POE"). See 43 U.S.C. § 1340(b), (c)(1). A POE must set forth, in detail, a schedule of planned exploration activities, a description of the equipment to be used, the location of each exploratory well to be drilled, and other pertinent information. See *id.* § 1340(c)(3). Following submission of a POE, the Secretary is required to determine whether the POE is "consistent" with the OCSLA and the regulations promulgated thereunder. *Id.* § 1340(c)(1). The Secretary may require modifications of a POE to achieve such "consistency," and upon determining that the POE is "consistent" with the OCSLA, the Secretary "*shall*" approve the POE. *Id.* (emphasis added).[4]

The OCSLA places a strict time limit for action by the Secretary with respect to a POE that is "consistent" with the OCSLA. Under the Act's express terms, "[t]he Secretary *shall* approve such plan, as submitted or modified, within *thirty days* of its submission," *id.* (emphases added), unless (A) the proposed exploratory activities would probably cause serious harm or damage to life (including fish and other aquatic life), national security, property, mineral deposits, or the environment *and* (B) the proposed activities "cannot be modified to avoid" such harm or damage, *id.* (incorporating by reference 43 U.S.C. § 1334 (a)(2)(A)(i)). If the Secretary disapproves a POE that is "consistent" with the OCSLA under the foregoing provision, he may cancel the lease, entitling the lessee to compensation. *Id.* § 1340(c)(1).

---

[4] If a lessee's planned exploratory activities will involve the discharge of any wastes into the ocean, the lessee must also obtain a National Pollutant Discharge Elimination System ("NPDES") permit from the Environmental Protection Agency ("EPA"). *See* 33 U.S.C. §§ 1311(a), 1342(a).

After a POE is approved, the next step in the process is for the lessee to obtain the necessary permits to begin exploratory drilling. *Id.* § 1340(d). Under the OCSLA, in order to obtain a federal drilling permit, a lessee whose activities will affect land or water uses in the coastal zone of a State with a federally approved coastal zone management program must, under the Coastal Zone Management Act, 16 U.S.C. § 1456(c)(3)(B) ("CZMA") certify that its proposed activities are consistent with the State's program. See 43 U.S.C. § 1340(c)(2). The Secretary may not issue a drilling permit unless the State concurs with the lessee's certification, CZMA § 1456 (c)(3)(B)(i), or is presumed to concur with that certification, *id.* § 1456(c)(3)(B)(ii), or the State's objection is overriden by the Secretary of Commerce, *id.* § 1456 (c)(3)(B)(iii). See 43 U.S.C. § 1340(c)(2).

A lessee's failure to obtain a State's CZMA concurrence is *not* a ground under the OCSLA for withholding approval of an otherwise approvable POE. Although the OCSLA expressly prohibits the Secretary from granting a drilling permit or permitting exploratory activity without a State's CZMA concurrence (or a federal override of its objection), it does *not* restrain him from taking the first step—approving a POE that complies with the OCSLA—even in the face of a State's CZMA objection. See *id.* § 1340(c)(1). Indeed, during the relevant period, the DOI's own regulations made clear that a State's CZMA objection was not a barrier to approving a POE that complied with the OCSLA. See 30 C.F.R. § 250.33(i) (1993).

If a lessee's initial exploration of its tract proves successful, it may (and usually will) pursue additional exploratory activities by preparing and submitting additional POEs. Finally, in order to extract any oil or gas found, the lessee must prepare and submit a development and

production plan ("POD"). See 43 U.S.C. § 1351(a)(1). Like a POE, a POD must describe the work to be performed, the facilities to be used, the environmental safeguards to be followed, and set forth other pertinent information. See *id.* § 1351(c). *Unlike* a POE, however, a POD may not, under the OCSLA's express terms, be approved unless a State concurs or is presumed to concur in the lessee's CZMA certification, or its objection is overridden by the Secretary of Commerce. See *id.* § 1351(d), (h)(1)(B).

3. *Petitioners' Initial Efforts To Explore Their Lease Tracts.*

In 1989, petitioners, the co-lessee of their OCS tracts, and the owners of other adjacent OCS leases organized their tracts into a single exploration unit (the "Manteo Unit") and proposed to drill a single exploratory well approximately 45 miles east of Cape Hatteras.[5] After the State of North Carolina raised initial environmental objections to the plan, Mobil (the operator of the Manteo Unit) entered into a memorandum of understanding with the DOI and the State on July 14, 1989. See J.A. 79-85. In this memorandum, Mobil agreed to produce a draft POE for the DOI's and the State's review and to delay submitting a final POE until after the DOI had completed a special environmental report assessing the environmental impacts of the proposed exploration of the Manteo Unit. See Pet. App. 7a.

On June 1, 1990, the DOI issued a three-volume, 2000-page special environmental report. Based on this report, which one DOI official agreed was "the most extensive and intensive environmental examination that has ever

[5] Four of petitioners' five OCS tracts were included in the Manteo Unit. *See* J.A. 79. The fifth—Lease Block No. 220—was not.

been afforded an exploration well in the OCS program," J.A. 179, the DOI determined that the proposed exploration of the Manteo Unit would not result in any significant environmental impacts—either offshore or to the North Carolina coastal zone—and that the Manteo Unit's POE was consistent with the OCSLA and "approvable in all respects." Pet. App. 194a.

4. *The Outer Banks Protection Act.*

On August 18, 1990—before Mobil was able to submit the Manteo Unit's final POE to the Secretary—the United States enacted the Outer Banks Protection Act ("OBPA") as part of the comprehensive Oil Pollution Act of 1990. See Pub. L. No. 101-380, § 6003, 104 Stat. at 555-58. This Act—without amending the OCSLA—expressly prohibited the United States from fulfilling its contractual obligations under petitioners' North Carolina OCS leases. By its terms, the OBPA imposed an open-ended "moratorium," Pet. App. 7a, on the approval of any exploration or development of North Carolina OCS lands:

> PROHIBITION.—The Secretary of the Interior shall not—
>
> (A) conduct a lease sale;
>
> (B) issue any new leases;
>
> (C) approve any exploration plan;
>
> (D) approve any development and production plan;
>
> (E) approve any application for permit to drill; or
>
> (F) permit any drilling,
>
> for oil or gas under the Outer Continental Shelf Lands Act on any lands of the Outer Continental Shelf offshore North Carolina.

OBPA § 6003(c)(1). This moratorium was to extend for not less than 13 months, until October 1, 1991, and thereafter until the 45th day of continuous congressional session after the Secretary submitted a written report to Congress certifying that the information acquired during new "ecological and socioeconomic studies, additional oceanographic studies, . . . and other additional environmental studies" which the OBPA required the Secretary to undertake, *id.* § 6003(d), was sufficient to enable him to carry out his responsibilities under the OCSLA, *id.* § 6003(c)(3)(A). The OBPA further mandated that the Secretary's report could be made only after he had considered the findings and recommendations of an Environmental Sciences Review Panel ("Review Panel"), which the OBPA created. *Id.* § 6003(c)(3)(A)(ii).

The OBPA's purpose is apparent both on its face and from its history. In 1988 and 1989, Congress enacted similar "moratoria" by prohibiting the DOI from expending any funds to approve any exploration of OCS tracts offshore of both Florida and Alaska. See Pub. L. No. 100-446, § 110, 102 Stat. 1774, 1801 (1988) (Florida); Pub. L. No. 101-121, § 111, 103 Stat. 701, 720 (1989) (North Aleutian Basin).[6] In June 1990, in response to environmental concerns raised by several States, President Bush instructed the DOI to cancel planned auctions of OCS leases offshore of California and Florida, to "[b]egin cancellation of *existing* leases off Florida," and to explore a "joint federal-state buy-back" of the Florida OCS leases. J.A. 99-100.

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[6] Like the OBPA, the Florida and Alaska moratoria prompted the affected lessees to file contract actions against the United States. Before those claims were resolved, however, the government settled and paid nine of the Florida and Alaska lessees approximately $175 million—more than 100 percent of the bonuses and rental payments they had paid—in exchange for the cancellation of their leases. *See* Fed. Cir. App. 973-80.

The State of North Carolina, and members of its congressional delegation, strenuously protested the omission of OCS tracts off its coast from these bans on exploration. In July 1990, Representative Jones of North Carolina introduced what would become the OBPA as an amendment to the Oil Pollution Act of 1990. Representative Jones candidly explained the purpose of the OBPA. "[I]n his offshore moratoria proposal, the President has forgotten about North Carolina. Well, I have not." 136 Cong. Rec. 22,275 (1990).[7]

The OBPA's text confirms that it was directed solely toward barring petitioners' proposed exploration of the Manteo Unit. In its findings, the OBPA specifically referred to petitioner Mobil, the operator of the Manteo Unit, and stated that the 2000-page environmental report that DOI had prepared pursuant to the July 1989 memorandum of understanding "ha[d] not allayed concerns about the adequacy of the environmental information available." OBPA § 6003(b)(7). See also H.R. Conf. Rep. No. 101-653, at 161 (1990) ("[T]he [OBPA] essentially addresses the proposal by Mobil Oil Corporation and seven partners to drill an exploratory well about 40 miles off Cape Hatteras.").

5. *Application Of The OBPA.*

On August 20, 1990—two days after the enactment of the OBPA—Mobil, on behalf of the Manteo Unit, sub-

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[7] Representative Rose of North Carolina expressed similar views:

> Governor Martin [of North Carolina] . . . was horrified when the President stopped offshore drilling off the coast of . . . Florida and left North Carolina out. And so he . . . wrote to Mr. Jones, and Mr. Jones did exactly what [Governor Martin] asked him to do, he put [the OBPA] in the legislation.

136 Cong. Rec. 22,277 (1990). *See also id.* at 22,278 (Rep. Young) (describing OBPA as a "moratorium"); *id.* at 22,279 (Rep. Lagomarsino) (same).

mitted its final POE to drill a single exploratory well on the North Carolina OCS lands leased by the Unit.[8] On September 28, 1990—30 days after the DOI deemed Mobil's submission to have been complete—the DOI found that the Manteo Unit's POE complied with all DOI regulations and would have no significant impact on the environment. The DOI reported to the Governor of North Carolina that:

> The [Manteo Unit] Plan, together with its supporting information, is deemed to be approvable in all respects. The Outer Banks Protection Act (OBPA) of 1990, however, prohibits the approval of any Exploration Plan at this time. Under Section 11 of the Outer Continental Shelf Lands Act [43 U.S.C. § 1337(c)], we are required to approve an Exploration Plan unless it is inconsistent with applicable law or because it would result in serious harm to the environment. Because we have found that [the Manteo Unit's] Plan fully complies with the law and will have only negligible effect on the environment, we are not authorized to disapprove the Plan or require its modification as you suggest.
>
> However, because we are currently prohibited from approving it, the Plan will remain on file until the requirements of the OBPA are met. Our determinations concerning this Plan will be reevaluated at that time.

[8] On April 17, 1990, Mobil submitted a NPDES permit application to the EPA, along with the required certification that its proposed exploratory activities were consistent with North Carolina's CZMA plan. *See* CZMA § 1456(c)(3)(A). North Carolina objected to that certification on July 16, 1990, *see* J.A. 106-07, thereby barring the EPA from issuing the NPDES permit absent override of the objection by the Secretary of Commerce, *see* CZMA § 1456(c)(3)(A). The Manteo Unit promptly appealed in order to obtain such an override. The State's objection to the Manteo Unit's NPDES permit, however, would not have barred exploratory drilling because petitioners could have adopted a "no discharge" approach in which any wastes would have been barged to shore. *See* J.A. 331.

Pet. App. 194a. Thus, although the DOI found the Manteo Unit's POE was "approvable in all respects," the Secretary nonetheless withheld his approval specifically in order to comply with the OBPA. Indeed, the government has conceded in this litigation that the Secretary would have approved the POE absent the OBPA. See U.S. Fed. Cir. Br. 39.

In response to the OBPA, the DOI also suspended petitioners' OCS leases—including the one that was not part of the Manteo Unit—as of August 18, 1990, the OBPA's effective date. The DOI cited as authority for its action a regulation that permitted the DOI to order operations on an OCS lease tract to be halted when "[t]he suspension is necessary to comply with judicial decrees prohibiting production or any other operation or activity, or the permitting of those activities, effective the date set by the court for that prohibition," 30 C.F.R. § 250.10(b)(7)(1993). See J.A. 129-31; see also *id.* at 133.[9]

As implicitly recognized in the DOI's suspension order, the OBPA's ban was not limited to the specific exploratory activities proposed in the Manteo Unit's pending POE. By its terms, the OBPA prohibited the Secretary

[9] DOI lifted this suspension only with respect to petitioners' Manteo Unit tracts on June 8, 1992, *see* J.A. 165-67, after the Secretary had certified that he had sufficient information to perform his responsibilities under the OCSLA with respect to the Manteo Unit's POE. Because the Secretary had stated that he would nonetheless not act on the POE or permit any drilling until additional studies recommended by the OBPA's Review Panel were completed, *see infra* at 15, Mobil requested that the suspension be reinstated. *See* J.A. 168-69; *id.* at 170-71. DOI granted Mobil's request, *see id.* at 173, and the suspension remained in effect until November 9, 1994, after studies were completed and the Secretary of Commerce had denied the Manteo Unit's appeals of North Carolina's CZMA objections. *See id.* at 337.

from approving *any* POE, permitting *any* drilling, or approving *any* POD for any North Carolina OCS tract, even if a lessee's application complied in every respect with the OCSLA and was *supported* (rather than opposed) by the State. See OBPA § 6003(c)(1). In short, as the Court of Federal Claims found, see Pet. App. 74a-84a, the OBPA foreclosed the government from performing any of the acts necessary for petitioners to pursue the rights they had purchased to explore and develop their North Carolina OCS tracts.

On November 19, 1990—even though the DOI had concluded two months earlier that the Manteo Unit's planned exploratory activities complied in all respects with the OCSLA and would not have any significant impact on the environment—the State of North Carolina objected to the Manteo Unit's certification that its POE was consistent with the States' CZMA program. See J.A. 141-48. Echoing the findings set forth in the legislation that its Governor had asked Representative Rose to introduce, see OBPA § 6003(b)(4)-(8), North Carolina's objection was based principally on its assertion that, even though the DOI had completed a 2000-page special environmental report just six months earlier, the available information was insufficient to assess the impact on the North Carolina coastal zone. See J.A. 142. The Manteo Unit lessees promptly appealed the State's CZMA objection to the Secretary of Commerce. See *infra* at 15 n.10.

In January 1992—almost a year after the deadline set by the OBPA—the Review Panel established by the Act belatedly submitted its report to the Secretary of the Interior. After reviewing this report, the Secretary certified to Congress on April 2, 1992, that "sufficient information presently exists to allow me to exercise my responsibilities under the OCSLA . . . and consider approval of the

exploration activities currently proposed to take place offshore North Carolina (*i.e.*, the first Manteo exploratory well) . . . ." Pet. App. 202a. Although the Secretary's certification arguably should have lifted the OBPA's "moratorium" with respect to the Manteo Unit's pending POE on the 45th day of continuous Congressional session following its submission, see OBPA § 6003(c)(3)(A), the Secretary nevertheless stated that he would not approve the POE or permit the drilling of the single proposed exploratory well until the completion of two studies that had been recommended by the Review Panel. See Pet. App. 202a. These studies were completed in July 1994, nearly two years after this litigation was commenced. The Secretary, however, ultimately never approved—or disapproved—the Manteo Unit's POE.[10]

By its express terms, the OBPA's "moratorium" applied to all activities required for petitioners to pursue exploration or development of their North Carolina OCS tracts from the OBPA's enactment in 1990 until its repeal in 1996, see Pub. L. No. 104-134, § 109, 110 Stat. 1321, 1321-177 (1996)—almost four years after petitioners filed this suit. The sole OBPA certification the Secretary ever made to Congress extended *only* to the single exploratory well proposed in the Manteo Unit's POE, which the Secretary nonetheless declined to approve. In fact, the Secretary specifically advised Congress in April 1992 that further studies would be required for him to make the

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[10] On September 2, 1994, the Secretary of Commerce declined to override North Carolina's CZMA objections to the Manteo Unit's POE and its NPDES permit application. *See* J.A. 196-260; *id.* at 261-336. The Secretary of Commerce's decision was based in large part on the OBPA's finding, and the opinion of the Review Panel that it created, that the available information was insufficient to assess the likely environmental and socioeconomic effects of the single exploratory well proposed in the Manteo Unit's POE. *See id.* at 247 (citing the OBPA); *see also id.* at 224, 227 n.35, 232-33, 239, 244 (citing Review Panel's report).

OBPA certification for additional (or different) wells, POEs, and PODs, and that those studies "w[ould] not begin in earnest prior to reviewing the initial exploration drilling" proposed in the Manteo Unit's POE. Pet. App. 202a. Accordingly, even if the Manteo Unit's POE had been approved and its single exploratory well allowed to proceed, the OBPA continued—even *after* the Secretary's April 1992 certification—as a bar to (i) all other exploratory plans (such as ones for drilling additional wells to determine the boundaires of any deposits found by the first well), (ii) different exploratory activities, and (iii) the ultimate production and development of any oil or gas deposits found, both for the Manteo Unit and petitioners' one non-Manteo tract.

6. ***Proceedings Below.***

In October 1992, Marathon and Mobil, along with the owners of other leases for North Carolina OCS tracts, joined a lawsuit filed by Conoco Inc. against the United States for breach of the leases it had entered into for, *inter alia*, OCS tracts off the coast of North Carolina. In that suit, petitioners contended that the enactment and enforcement of the OBPA had materially breached their OCS leases by preventing the Secretary from performing his contractual duties. As the Court of Federal Claims explained, petitioners "d[id] not claim that [the government's] failure to approve [their] POEs and grant the necessary permits breached [its] lease contracts, but only that [the government's] failure at least to fairly consider their plans was a material breach." Pet. App. 57a. Accordingly, petitioners sought restitution of the up-front, cash "bonuses" they had paid, as well as their annual lease payments.

On April 1, 1996, the Court of Federal Claims granted partial summary judgment for petitioners as to liability,

holding that the United States' "failure [to carry out its contractual obligations], under the restrictions adopted pursuant to the OBPA, was a material breach of the leases." Pet. App. 84a. The court began by rejecting the United States' principal claim that the text of the leases—which made them subject to the OCSLA, "regulations . . . in existence upon the effective date of th[ese] lease[s,] . . . and *all other applicable statutes and regulations*," *id.* at 175a (§ 1) (emphasis added)—made petitioners' contractual rights expressly subject to all future statutes enacted by the United States, including one, such as the OBPA, which was both unforeseeable and effectively extinguished petitioners' rights. See *id.* at 68a-69a. As the court concluded, "the lease contracts here at issue cannot be construed to allow for such drastic unilateral interference by the government, through passage of highly restrictive legislation, the OBPA, with the lessees' bargained for rights of exploration." *Id.* at 67a.

The court next held that the United States' enactment and implementation of the OBPA constituted a "total breach" of its lease contract with petitioner:

> [U]nder the lease agreements, defendant was contractually obligated to consider facially compliant POEs promptly and fairly. Any contrary interpretation would render the bargain illusory and subject to unilateral forfeiture. Clearly, the OBPA imposed severe, burdensome, new conditions upon the DOI's obligation under OCSLA to approve POEs offshore North Carolina, which were not contemplated by the parties when the leases were executed. Therefore, the court also finds that compliance with the OBPA compelled governmental breach by non-performance accompanied by an anticipatory repudiation thereby giving rise to "total breach."

Pet. App. 76a.[11] On July 24, 1997, the Court of Federal Claims awarded Marathon Oil and Mobil restitution of the up-front, cash "bonuses" they had paid for their North Carolina OCS leases and entered judgment for Marathon Oil in the amount of $78,242,368.59 and for Mobil for $78,257,565.00. J.A. 339-40.

On October 15, 1998, a divided panel of the Federal Circuit reversed. Judge Plager, who was joined by Judge Schall, wrote the majority opinion. Judge Newman dissented. Petitioners timely filed a petition for rehearing and suggestion for rehearing *en banc*. Thereafter, five members of the court of appeals, including Judge Schall, recused themselves. Judge Schall was replaced by Judge Rader. On May 13, 1999, without hearing re-argument, the newly-constituted panel issued a revised opinion again reversing the judgment of the Court of Federal Claims, again by a divided vote.

The majority opinion, again authored by Judge Plager, first agreed with the Court of Federal Claims that petitioners' OCS leases were not, by their terms, subject to modification by subsequent legislation such as the OBPA. See Pet. App. 12a. The court of appeals rejected the lower court's conclusion that the government's OBPA-compelled breach of petitioners' leases entitled them to restitution, however, because, in its view, the OBPA was

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[11] Relying on *Winstar Corp.* v. *United States*, 64 F.3d 1531 (Fed. Cir. 1995) (*en banc*), the court also rejected the government's arguments that it was immune from liability under the sovereign acts and unmistakability doctrines, finding that the OBPA "was not an act of public, general applicability," Pet. App. 96a, but was instead "narrowly tailored to target the specific contracts and sought to abate the accompanying rights here at issue," *id.* at 91a. The Federal Circuit's opinion in *Winstar* was later affirmed by this Court in *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996), after which the government abandoned its sovereign acts and unmistakability arguments in this case.

not the "operative cause," *id.* at 4a, for the DOI's failure to approve the Manteo Unit's POE:

> Whatever restraints on secretarial actions were imposed by the OBPA essentially had no effect upon these OCS leases because exploration could not proceed without North Carolina's concurrence in the POE's CZMA consistency certification or the override provided by law.
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> . . . .
>
> [E]ven if the Secretary had felt constrained in acting on the application by the provisions of the OBPA, the law is clear that, had he been free to act, he could not have issued any permits for exploration so long as North Carolina's objections remained in force.

Id. at 14a-15a. Although the majority acknowledged that petitioners' rights to explore and develop their OCS tracts had been frustrated, it denied petitioners restitution of the up-front "bonuses" they had paid on the ground that there was

> no principled distinction between a lessee whose hopes for large rewards from such a lease are frustrated by a failure to obtain the necessary permits for exploration, and those of a lessee whose hopes are drowned by impossible weather, equipment failures, financial setbacks, or any number of other circumstances beyond the lessee's control. In either case, the lessee contracted for the exclusive opportunity to explore in a certain area; the inability of a lessee to explore, if not attributable to the Government, does not create an entitlement to any refund of the consideration paid to obtain the lease.

Id. at 18a.

Judge Newman dissented. In Judge Newman's view, petitioners and the government had entered into a contract under which petitioners had purchased an entitlement to

explore their tracts, which was later eliminated by the enactment of the OBPA. Pet. App. 20a. As Judge Newman explained:

> When one party to a contract prevents the other party from achieving the benefit for which it paid, the party who prevents the performance can not retain the consideration it accepted for the performance. . . . [Petitioners] do[] not challenge the government's change of policy; nor do[] [they] seek damages, or specific performance, or other interesting things. [They] just want[] [their] money back.

Id. at 19a-20a. The post-contract events that made it impossible for the government to perform its promise to " 'timely and fairly consider' exploration plans that were properly submitted," *id.* at 21a, "were all outside the control of Marathon," *id.* at 22a. Applying both "hornbook law," *id.*, and a "wealth of precedent," *id.* at 23a, Judge Newman concluded that the "withdrawal of [petitioners'] federal right," *id.*, required "return of the federal consideration," *id.* As Judge Newman explained, any other result would relieve the government of its duty to "deal fairly and legally with its contracting partners." *Id.* at 21a.

SUMMARY OF ARGUMENT

1. In this case, the United States entered into contracts in which, in exchange for the more than $156 million that petitioners paid, the United States bound itself to adhere to the time frames and substantive standards set forth in the OCSLA when acting on petitioners' requests for its approval of plans and applications necessary for them to explore and develop their OCS lease tracts. Thereafter, the United States enacted the OBPA, which by its express terms prohibited the government from performing *any* of the duties it had undertaken under petitioners' leases for an indefinite period. Having thus repudiated its contractual obligations and made its own performance impossible, the United States was in total breach, entitling petitioners to restitution.

A. The enactment of the OBPA placed the United States in total breach of petitioners' leases. First, the OBPA constituted a categorical repudiation of the duties the government had undertaken. Although the government had contractually obligated itself to timely and fairly consider plans and applications petitioners submitted, the OBPA categorically barred it from doing so and announced the United States' unequivocal intention not to perform the duties it had assumed under its contracts with petitioners for at least 13 months and perhaps forever. Moreover, the OBPA was a repudiation of petitioners' leases even if it is viewed not as having disabled the government completely from performing its contractual obligations, but instead as merely having imposed additional conditions on the Secretary's performance of the government's pre-existing obligations. It is hornbook law that a party may not unilaterally impose new and more onerous conditions on its performance under a contract without repudiating and placing itself in breach. See *Restatement (Second) of Contracts* § 250 cmt. b (1981). By enacting the OBPA, the United States purported to condition its performance on the additional requirements embodied in the Act and thereby placed itself in breach.

Finally, in addition to constituting an unequivocal repudiation of all of the government's obligations under petitioners' leases, the OBPA also caused the government's performance to fall specifically short of what the contract demanded in the only instance in which its performance was actually called for. Under the parties' bargain, the Secretary of the Interior was obliged to approve a POE that complied with the OCSLA within 30 days of its submission. When petitioners submitted such a POE—which

the DOI found to be "approvable in all respects"—the Secretary withheld his approval specifically in order to comply with the OBPA and thereby defaulted on the government's duties under petitioners' contracts.

2. The government's contention that the OBPA's repudiation of all of the performance the government was obligated to provide under petitioners' leases, coupled with the actual nonperformance it compelled, did not constitute a "material breach" defies credulity. A material breach is one which deprives the injured party of the performance that that party expected from the parties' agreed-upon exchange of performances. In this case, the government's enactment of the OBPA compelled the government to withhold performance of all of the duties it had undertaken in exchange for petitioners' payments and thereby deprived them of the performance for which they had bargained.

3. The United States' alternative suggestion that it is not in breach because it withdrew its repudiation by repealing the OBPA in 1996 disregards settled contract rules. The power to retract a repudiation ends when the injured party brings a suit to enforce the contract. Petitioners in this case filed suit nearly four years before the OBPA was repealed. The repeal simply came too late to nullify the government's breach. See 4 Arthur Linton Corbin, *Corbin on Contracts* § 980, at 930-31 (1951).

B. It is well established that restitution is available as an alternative remedy when the defendant has repudiated his duties under a contract or otherwise committed a total breach. See, *e.g.*, *Restatement (Second) of Contracts* § 373(1). Indeed, the alternative remedy of restitution is available following repudiation, even where expectation damages would not be or could not be proved. See, *e.g.*, *id.* § 373(1) & cmt. a. The court of appeals ignored this well-established principle of contract law, and instead

fashioned a heretofore unknown "harmless error" exception to the ordinary principles of restitution. Its holding—that the "OBPA essentially had no effect," Pet. App. 14a, because petitioners never would have been allowed to drill and produce oil and gas off the North Carolina coast—is fatally flawed both legally and factually.

There is no "harmless error" exception to an innocent party's right to restitution. Where, as here, a defendant has placed itself in total breach, a plaintiff need not have been able to have performed his own obligations and or to have satisfied any conditions precedent to the defendant's performance in order to obtain restitution. Although a plaintiff seeking *expectation damages* must prove that, but for the defendant's breach, he would have performed his own obligations and received the benefits of his contract, it is black-letter law that a plaintiff seeking *restitution* need not.

In addition, the court of appeals' decision was also based on a fundamental misapprehension of the facts in this case. As a factual matter, the OBPA did "have an effect." Indeed, by the government's own admission, it caused the United States to fail to perform its contractual duty to approve a POE that was "approvable in all respects," Pet. App. 194a. Moreover, it also made it impossible for petitioners to pursue any other exploration or development activities.

II. Even if the OBPA did not place the government in total breach, petitioners are nonetheless entitled to restitution under the doctrine of supervening impracticability. Whatever else the OBPA accomplished, it certainly made it impossible for the government to fulfill its responsibilities under petitioners' leases. Even assuming *arguendo* that government's repudiation of its contracts with petitioners could be excused under the doctrine of impractica-

bility, even the United States "is not privileged to keep something for nothing, and restitution is an available remedy against [it]," 5 Arthur Linton Corbin, *Corbin on Contracts* § 1102, at 549 (1964). Here, the government proposes to keep more than $156 million for nothing. Not surprisingly, normal principles of contract law—and common sense—do not permit a private party to behave this way, and under *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996), and its predecessors, neither may the United States.

ARGUMENT

Three years ago, this Court reaffirmed the long-standing principle that " '[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.' " *United States* v. *Winstar Corp.*, 518 U.S. 839, 895 (1996) (plurality opinion) (quoting *Lynch* v. *United States*, 292 U.S. 571, 579 (1934)). See also *id.* at 912 (Breyer, J., concurring) (same). *Accord Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 369 (1943) ("The United States does business on business terms.") (quoting *United States* v. *National Exch. Bank*, 270 U.S. 527, 534 (1926)); *Perry* v. *United States*, 294 U.S. 330, 352 (1935) ("When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments. There is no difference . . . except that the United States cannot be sued without its consent.") (citation omitted); *United States* v. *Bostwick*, 94 U.S. 53, 66 (1876) (same); *Cooke* v. *United States*, 91 U.S. 389, 398 (1875) (same). Indeed, as this Court has noted, adherence to the general rules of contract law is essential to preserving "the Government's capacity as a reliable, straightforward contractor." *Winstar*, 518 U.S. at 886 (plurality opinion).

One fundamental principle of the " 'law applicable to contracts between private individuals,' " *id.* at 895 (plurality opinion), is that a party whose performance is made impossible either by its own acts, see, *e.g.*, *Ankeny* v. *Clark*, 148 U.S. 345, 353 (1893), or by supervening impracticability "is not privileged to keep something for nothing, and restitution is an available remedy against [it]," 5 Arthur Linton Corbin, *Corbin on Contracts* § 1102, at 549 (1964). In particular, where, as here, a defendant repudiates its contractual obligations or commits a material breach, the plaintiff is entitled to restitution. See, *e.g.*, *Restatement (Second) of Contracts* § 373(1) (1981). Under these principles, petitioners were entitled to get back the money they had paid to the government, and the court of appeals' decision denying them restitution should be reversed.

I. THE ENACTMENT OF THE OBPA REPUDIATED AND TOTALLY BREACHED PETITIONERS' OCS LEASES, ENTITLING THEM TO RESTITUTION.

A. Enactment Of The OBPA Repudiated, And Placed The United States In Total Breach Of, Its Lease Agreements With Petitioners.

1. The government's enactment of the OBPA placed it in breach of its lease contracts with petitioners. As the Court of Federal Claims concluded, see Pet. App. 76a, and the Federal Circuit did not dispute, see *id.* at 12a-13a, the OBPA anticipatorily repudiated the government's obligations under petitioners' leases and also compelled the government not to perform when its performance with respect to the Manteo Unit's POE was required under the contract. It was thus in "total breach." See, *e.g.*, *Restatement (Second) of Contracts* § 243(2) (1981) ("total breach" includes "a breach by non-performance accompanied or followed by a repudiation"); *Dobler* v. *Malloy*, 190 N.W.2d 46, 52 (N.D. 1971); *Gold Mining & Water*

Co. v. *Swinerton*, 142 P.2d 22, 27 (Cal. 1943); *Sagamore Corp.* v. *Willcutt*, 180 A. 464, 465 (Conn. 1935).

a. The OBPA constituted an express and unequivocal repudiation by the government of its obligations under petitioners' leases. It has long been settled that "a positive statement to the promisee indicating that [the promisor] will not or cannot substantially perform his contractual duties" is a repudiation. See, *e.g.*, *Gold Mining & Water*, 142 P.2d at 27. *Accord Restatement (Second) of Contracts* § 250(a); II E. Allan Farnsworth, *Farnsworth on Contracts* § 8.21, at 475 (1990); 11 Walter H.E. Jaeger, *Williston on Contracts* § 1312, at 109 (3d ed. 1968); John D. Calamari & Joseph M. Perillo, *The Law of Contracts* § 12.4, at 480-81 (1998). Similarly, "a voluntary affirmative act which renders the obligor unable or apparently unable to perform" is also a repudiation of a contract. *Restatement (Second) of Contracts* § 250(b). *Accord Roehm* v. *Horst*, 178 U.S. 1, 8 (1900) ("It is not disputed that if one party to a contract has . . . disabled himself so as to make performance impossible, his conduct is equivalent to a breach of the contract, although the time for his performance has not arrived."); *id.* at 18 (same); *Ankeny* v. *Clark*, 148 U.S. 345, 353 (1893).

This Court recently reaffirmed that where, as here, the government, through post-contract legislation, makes performance of its contractual obligations impossible, it repudiates, and places itself in total breach of, its contract. See *United States* v. *Winstar Corp.*, 518 U.S. 839, 870 (1996) (plurality opinion); *id.* at 918 (Breyer, J., concurring); *id.* at 919 (Scalia, J., concurring in judgment). In *Winstar*, the United States had entered into contracts in which it specifically promised to permit certain thrifts to treat goodwill as capital for up to 40 years in exchange for their acquiring and assuming the liabilities of other, failing thrifts. See *id.* at 867-68 (plurality opinion). Thereafter, the government enacted legislation and

adopted implementing regulations prohibiting those thrifts from treating goodwill as capital. See *id.* at 868-69 (plurality opinion). This Court held that, because Congress had made it impossible for the government to perform its ongoing obligations under the contracts, it had repudiated those contracts and was in total breach. See *id.* at 870 (plurality opinion); *id.* at 918 (Breyer, J., concurring); *id.* at 919 (Scalia, J., concurring in judgment). See also *Far West Fed. Bank* v. *Office of Thrift Supervision—Director*, 119 F.3d 1358, 1364-65 (9th Cir. 1997) (same).

In this case, the United States also expressly repudiated its ongoing contractual obligations. By entering into petitioners' leases, the government contractually obligated ttself to comply with the requirements of the OCSLA in exchange for the consideration petitioners paid. Section 1 of each lease expressly provided that it was issued "pursuant to" and "subject to" the OCSLA, see Pet. App. 175a, and thereby incorporated the provisions of OCSLA by reference and made them part of the contract. See, *e.g.*, 4 Walter H.E. Jaeger, *Williston on Contracts* § 581, at 135 (3d ed. 1961) (incorporated terms are part of the contract itself); *The Binghamton Bridge*, 70 U.S. (3 Wall.) 51, 78-79 (1870). By executing petitioners' leases, the government assumed the contractual duty to "timely and fairly consider—not necessarily approve, but at least consider—exploration plans properly submitted," Pet. App. 76a, and otherwise to adhere to the time lines and substantive standards set forth in the OCSLA when acting on petitioners' requests for its approval of plans and applications necessary for them to explore and develop their lease tracts. "Otherwise," the court concludued, "the bargain between the [United States] and [petitioners] would be illusory and would permit [the government's] unilateral forfeiture of [petitioners'] lease bonuses with impunity." *Id.* at 57a; *accord id.* at 76a.

Nonetheless, by its express terms, the OBPA renounced the governments' promise to adhere to the OCSLA's regulatory scheme and, in fact, flatly prohibited it from doing so. As the court of appeals found, the OBPA imposed an indefinite and unconditional "moratorium," Pet. App. 7a, on the government's performance of all of its obligations under petitioners' leases. Although petitioners' leases obligated the government to "timely and fairly consider" plans and applications petitioners submitted, by its express terms, the OBPA completely barred the government from:

> . . .
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> (C) approv[ing] *any* exploration plan;
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> (D) approv[ing] *any* development and production plan;
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> (E) approv[ing] *any* application for permit to drill; or
>
> (F) permit[ing] *any* drilling
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> . . . .

OBPA § 6003(c)(1) (emphases added). Thus, although the government was, under petitioners' leases, required to approve any POE that was consistent with the requirements of the OCSLA within 30 days of submission, see 43 U.S.C. § 1340(c)(1), the OBPA prohibited the Secretary from approving any POE, even one that complied with the requirements of the OCSLA in every respect, until the OBPA's "moratorium" was lifted. See OBPA § 6003(c)(3)(A). It likewise prohibited the Secretary from performing any of the other actions—*e.g.*, approving drilling permits and PODs that complied with the OCSLA, see *id.* § 6003(c)(1)(D)-(F)—which the government's lease contracts with petitioners obligated him to do. This prohibition on Secretarial action was not limited to the Manteo Unit's POE, but extended throughout the life of the OBPA to *every* POE, drilling permit application, or POD that petitioners might have submitted, either for the

Manteo Unit or for their non-Manteo tract. In short, the OBPA was a classic repudiation: the government "disabled [it]self from performing [its contract] by [its] own act." *Ankeny*, 148 U.S. at 353.

The OBPA's repudiation of petitioners' leases was hardly fleeting. By the OBPA's express terms, its prohibition on the government's performance was to extend for at least 13 months, until October 1, 1991, and thereafter potentially in perpetuity—*i.e.*, until the Secretary completed new "ecological and socioeconomic studies, additional oceanographic studies, . . . and other additional environmental studies" OBPA § 6003(d), and certified to Congress that the information acquired in those studies was sufficient for him to perform his pre-existing duties under the OCSLA and petitioners' leases, *id.* § 6003(c). In fact, the OBPA's moratorium was not ultimately lifted until nearly six years later, on April 26, 1996—after petitioners had filed suit and after the Court of Federal Claims had granted them partial summary judgment—when the OBPA was finally repealed. See Pub. L. No. 104-134, § 109, 110 Stat. 1321, 1321-177 (1996).[12]

b. The OBPA also constituted a repudiation of petitioners' leases even if it is viewed not as disabling the government completely from performing its contractual obligations, but instead—as the court of appeals sug-

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[12] The OBPA's moratorium arguably should have been lifted solely with respect to the Manteo Unit's POE on the 45th day of continuous Congressional session after the Secretary's April 2, 1992, certification to Congress. *See supra* at 14-15. However, in that certification, the Secretary stated that he would nevertheless not approve the Manteo Unti's POE or permit the drilling of the single proposed exploratory well until the completion of two studies that had been recommended by the OBPA's Review Panel. *See* Pet. App. 202a. Those studies were not completed until July 1994, nearly two years after this litigation was commenced. *See supra* at 15.

gested, see Pet. App. 15a-16a—as merely imposing additional conditions on the Secretary's performance of the government's pre-existing obligations. "If one who is bound to perform a contract annexes an unwarranted condition to his offer of performance, there is, in effect, a refusal to perform." *Loop Bldg. Co.* v. *De Coo*, 275 P. 881, 885 (Cal. Dist. Ct. App. 1929). *Accord Restatement (Second) of Contracts* § 250 cmt. b ("language that under a fair reading 'amounts to a statement of intention not to perform except on conditions which go beyond the contract' constitutes a repudiation" (quoting U.C.C. § 2-610 cmt. 2)); 4 Arthur Linton Corbin, *Corbin on Contracts* § 973, at 910-11 (1951) (same). See also *Placid Oil Co.* v. *Humphrey*, 244 F.2d 184, 188-89 (5th Cir. 1957) (lessor's imposition of burdensome new conditions on oil lessee constituted repudiation of lease contract); *United States* v. *Western Cas. and Sur. Co.*, 498 F.2d 335, 339 (9th Cir. 1974) (imposition of new and onerous conditions and delay on plaintiff constitutes breach by repudiation); *VanHaaren* v. *State Farm Mut. Auto. Ins. Co.*, 989 F.2d 1, 6 (1st Cir. 1993); *REA Express, Inc.* v. *Interway Corp.*, 538 F.2d 953, 955 (2d Cir. 1976).

By its terms, the OBPA unilaterally "imposed severe, burdensome, new conditions" on the Secretary's performance of his duties under petitioners' leases "which were not contemplated by the parties when the leases were executed." Pet. App. 76a. For example, under the parties' contract, which expressly incorporated the OCSLA, see *id.* at 175a. (§ 1), the government was required to approve any POE that was consistent with the requirements of the OCSLA within *30 days* of submission, see 43 U.S.C. § 1340(c)(1). After the enactment of OBPA, the Secretary was prohibited from approving a POE, even one that was otherwise "approvable in all respects," for at least *13 months* and thereafter until the new studies

the OBPA required him to undertake were completed and he made the required certification to Congress. See OBPA § 6003(c)(3)(A). The OBPA likewise supplanted the statutory and regulatory scheme that the parties had incorporated when they entered into the lease contracts by prohibiting the Secretary from approving any drilling permit application or POD until the OBPA's new conditions for his performance were met, even if North Carolina enthusiastically supported petitioners' proposed activities, or filed a CZMA objection that was overriden by the Secretary of Commerce.

c. In addition to repudiating all subsequent government performance, the OBPA caused an actual "breach by non-performance," Pet. App. 76a, in September 1990 by compelling the Secretary to fail to perform his contractual duty timely to approve the Manteo Unit's POE. As the DOI itself found, the Manteo Unit's POE "fully complie[d] with the law," *id.* at 194a, and was "approvable in all respects," *id.* Indeed, the DOI found that, because the POE fully complied with the requirements of the OCSLA and "w[ould] have only negligible effect on the environment," it could neither disapprove the POE nor require its modification, as the Governor of North Carolina had requested. *Id.* Nonetheless, in order to comply with the newly-enacted OBPA, the Secretary withheld approval of the pending POE, *id.*, thereby breaching the government's contractual obligation to "timely and fairly consider . . . exploration plans properly submitted" to it, *id.* at 76a, and to approve them if they complied with the OCSLA, which the Manteo Unit's POE did.

2. The government has argued that neither the OBPA's repudiation of the government's obligations under petitioners' leases nor the Secretary's OBPA-compelled failure to approve the Manteo Unit's POE in September 1990 was a "material breach" because "at all times, petitioners

were disabled from proceeding with their proposed plan of exploration because North Carolina independently objected to the CZMA certification," Cert. Opp. 13. This argument erroneously collapses the question of whether the OBPA repudiated or otherwise materially breached the government's obligations and placed it in total breach, see *supra* at 25-31, into the question of what remedies (particularly expectation damages) are available against it as a consequence of that breach in light of North Carolina's subsequent CZMA objection and the Secretary of Commerce's even later refusal to override that objection, see *infra* at 36-42. First, there can be no question that there was a breach. "When performance of a duty under a contract is due any non-performance is a breach." *Restatement (Second) of Contracts* § 235(2). *Accord* II Farnsworth, *supra*, § 8.8, at 397. Likewise, there is a breach by repudiation where a defendant states " 'that he will not or cannot substantially perform his contractual duties.' " 11 Jaeger, *supra*, § 1312, at 109 (quoting *Gold Mining & Water Co.* v. *Swinerton*, 142 P.2d 22, 27 (Cal. 1943)). In August 1990, the OBPA repudiated the government's obligations under petitioners' leases by imposing an indefinite moratorium on the entirety of the government's performance of its contractual obligations, see OBPA § 6003(c)(1)(C)-(F), which was not lifted until the OBPA was repealed. It also compelled the government not to perform when its performance with respect to the Manteo Unit's POE was required under petitioners' leases in September 1990. The government was thus in breach.

Second, and more importantly, the government's argument that it did not commit a material breach simply misconstrues the law and the nature of the contracts between the parties in this case. A breach is "material" when it "deprive[s] the injured party of the benefit that party expected from the exchange." II Farnsworth, *supra*, § 8.16,

at 443; *id.* at 442 n.2 (material means "more than just a little"). *Accord Link* v. *Department of Treasury*, 51 F.3d 1577, 1583 (Fed. Cir. 1995) (material breach committed when plaintiff was "deprived of the full benefit . . . for which he had bargained"); *Restatement (Second) of Contracts* § 241(a). Thus, a breach is material if, by that breach, the defendant refused to or failed to render the performance that it agreed to "exchange" for plaintiff's performance. *Id.* § 241 cmt. b; *id.* § 243(1) & cmt. a. Such a breach "amount[s] to the nonoccurrence of a constructive condition of exchange," II Farnsworth, *supra*, § 8.16, at 442, which relieves the non-breaching party of any duty to continue to perform its own obligations. *Id. Accord* 4 Corbin, *supra*, § 946, at 809; *Restatement (Second) of Contracts* §§ 237, 238. Similarly, "[i]n order to create a right of restitution, all that is necessary is that the plaintiff shall have rendered part of the performance that was the *agreed exchange* for the performance promised by the defendant." 5 Arthur Linton Corbin, *Corbin on Contracts*, § 1107, at 575 (1964) (emphasis added).

By entering into the leases at issue in this case, petitioners obligated themselves to pay up-front, cash "bonuses" of more than $156 million, make annual rental payments, and—if production ever commenced—pay royalties on the oil and gas they extracted. See Pet. App. 174a, 176a-178a (§§ 4-7). In exchange for petitioners' payments, the government promised to adhere to the OCSLA's terms and, in particular, to "timely and fairly consider" the plans and applications necessary for petitioners to explore and developed their lease tracts. See *supra* at 27. Indeed, without assuming that "necessary reciprocal obligation," Pet. App. 76a, the government would have provided no consideration at all and the bargain it entered into with petitioners would have been com-

pletely illusory. See *id.* See also 1 R. Lord, *Williston on Contracts* § 1:2, at 11 (4th ed. 1990); *Winstar*, 518 U.S. at 921 (Scalia, J., concurring in judgment).

The critical question in determining whether the government's enactment of the OBPA placed it in "material breach"—either by repudiation alone or by repudiation coupled with actual nonperformance—is whether the Act directed the government to withhold the performance for which petitioners had paid. The answer is that it clearly did. Under petitioners' leases, the only performance that the government promised was to timely and fairly consider petitioners' plans and applications. At a minimum, as the Court of Claims found (and the court of appeals did not disagree) "the OBPA imposed severe, burdensome, new conditions" upon the government's performance of that promise, see Pet. App. 76a, that—*by design*, see *supra* at 10-11—deprived petitioners of the benefits for which they had bargained. See also Pet. App. 67a (enactment of the OBPA constituted "drastic unilateral interference by the government . . . with lessees' bargained for rights"). The enactment of OBPA was thus a material breach.

Finally, "[t]he doctrine of material breach is simply the converse of the doctrine of substantial performance." II Farnsworth, *supra*, § 8.16, at 442. If the government were correct in its argument that the enactment of the OBPA was not a repudiation or "material" breach of petitioners' leases, it follows that the government was, throughout the life of the OBPA, in substantial compliance with its duties under the leases. See *id.* Substantial performance is performance that is " 'almost complete.' " *Id.* § 8.16, at 442 n.2. But the OBPA directed that the government could render *no* performance for at least 13 months, and perhaps in perpetuity—not "almost complete" performance. If the government's breach had not been

material, petitioners would have been obligated to continue to make the annual rental payments required under the leases, even while the OBPA's "moratorium" on the government's performance of its obligations remained in full force. See *id.* § 8.15, at 436; *id.* § 8.16, at 442 (other party may suspend its performance only if breach is material). However, not even the government has embraced this absurd (but necessary) implication of its argument that the OBPA did not place it in material breach. In fact, one month after the OBPA's enactment, even the DOI—citing the OBPA's "specific prohibit[ion]" on its approval of "any" POE, drilling permit, or "any drilling," see J.A. 129—acknowledged that petitioners' leases (and petitioners' duty to make rental payments) were suspended. See *supra* at 13.[13]

3. The government also has suggested that the enactment of the OBPA did not breach petitioners' leases because it was subsequently repealed and the moratorium on the government's performance of its obligations lifted, leaving petitioners free to exercise their rights under their leases and the OCSLA. See Cert. Op. 13-14. This argument is manifestly incorrect.

> One who has committed an anticipatory breach by a manifestation of an intention not to perform his contract has power to nullify its effect as a breach by notifying the promisee that he has changed his wrongful intention and will perform the contract. This power of retraction will cease to exist as soon as the promisee has materially changed his position

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[13] In addition, a defendant's bad faith makes it more likely that a breach is material. *See Restatement (Second) of Contracts* § 241(e) (1981); *id.* § 243 cmt. e. As the former Assistant Secretary of the Interior for Lands and Minerals testified, the OBPA was both a breach of petitioners' leases and an act of bad faith by the government, *see* J.A. 187.

> in reliance on the repudiation. *The bringing of a suit by the promisee for the anticipatory breach is one sort of reliance making retraction impossible.*

4 Corbin, *supra*, § 980, at 930-31 (emphasis added) (footnotes omitted). See also *Restatement (Second) of Contracts* § 256 & cmt. c; 11 Jaeger, *supra*, § 1335, at 182-83. Petitioners filed this suit against the government on October 28, 1992. See Pet. App. 46a. And the Court of Federal Claims entered partial summary judgment as to liability in their favor on April 1, 1996. See *id.* at 45a. The OBPA was not repealed until nearly a month later, on April 26, 1996. See Pub. L. No. 104-134, § 109, 110 Stat. at 1321-177. Thus, the OBPA's repeal simply came too late to retract or nullify the government's legislative repudiation of its contractual obligations under the leases six years earlier. See *Restatement (Second) of Contracts* § 256 cmt. c (filing of lawsuit extinguishes party's ability to retract its repudiation of contract); *Lake Erie Distribs., Inc.* v. *Martlet Importing Co.*, 634 N.Y.S.2d 599, 601 (N.Y. App. Div. 1995); *United States* v. *Seacoast Gas Co.*, 204 F.2d 709, 711 (5th Cir. 1953).[14]

B. The Government's Repudiation And Total Breach Of Petitioners' Leases Entitled Petitioners To Restitution.

1. One of the fundamental principles of "'the law applicable to contracts between private individuals,'"

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[14] Moreover, as indicated by its legislative history, "[t]he [1996] repeal . . . [wa]s not intended to excuse the United States from . . . liabilit[y], if any, it has incurred to date nor otherwise affect pending litigation." 141 Cong. Rec. H9443 (daily ed. Sept. 21, 1995). *Cf.* 1 U.S.C. § 109 ("The repeal of any statute shall not have the effect to release or extinguish any . . . liability under such statute, unless the repealing Act shall so expressly provide.")

Winstar, 518 U.S. at 895 (plurality opinion), is that "on a breach by non-performance that gives rise to claim for damages for total breach *or on a repudiation*, the injured party is entitled to restitution for any benefit he has conferred on the other party . . . ." *Restatement (Second) of Contracts* § 373(1) (emphasis added). *Accord Ankeny*, 148 U.S. at 353 (same); *Lee* v. *Foote*, 481 A.2d 484, 485-86 & nn.3, 6 (D.C. 1984) (same; collecting cases). Indeed, the alternative remedy of restitution is available following repudiation, even where expectation damages would not be or could not be proved:

> If a repudiation is recognized as a breach of contract, the injured party is given the alternative remedy of restitution on the same conditions as in other cases of total breach. It makes no difference whether the repudiation was anticipatory or was accompanied by a breach by non-performance of a promise. Indeed, it appears that even courts that do not like to recognize an anticipatory repudiation as a breach for which an action for damages will lie are willing to maintain an immediate action for restitution of the consideration paid.

4 Corbin, *supra*, § 979, at 928-29. See also *Restatement (Second) of Contracts* § 373 cmt. a ("Restitution is available on repudiation by the other party, even in those exceptional situations in which no claim for damages for total breach arises as a result of repudiation alone."). Similarly, it is well-established that the restitution is available even where the amount of restitution exceeds the provable amount of expectation damages. See, *e.g.*, *Nash* v. *Towne*, 72 U.S. (5 Wall.) 689, 702 (1866); *United States* v. *Algernon Blair, Inc.*, 479 F.2d 638, 641 (4th Cir. 1973); *Restatement (Second) of Contracts* § 373, cmts. b, d & illus. 1, 16; III E. Allan Farnsworth, *Farns-*

worth on Contracts § 12.20, at 325-26 (2d ed. 1998).[15] As one leading treatise states, a contrary result "would be a shocking decision." I George E. Palmer, *The Law of Restitution* § 4.3, at 381-83 (1978). And this principle has been recognized to apply with equal force in government contract cases. See, *e.g.*, *Acme Process Equip. Co.* v. *United States*, 347 F.2d 509, 528 (Ct. Cl. 1965) ("The applicability of restitution as an alternative remedy for breach [of contract] is . . . well-established in both the federal and state courts."), *rev'd on other grounds*, 385 U.S. 138 (1966); *Petrofsky* v. *United States*, 488 F.2d 1394, 1405 (Ct. Cl. 1973) (same).[16]

2. The court of appeals ignored this well-established principle of contract law, and instead fashioned a heretofore unknown "harmless error" exception to the ordinary principles of restitution. Focusing exclusively on the government's "actual breach" of withholding timely approval of the Manteo Unit's POE (rather than petitioners' broader claims for the government's repudiation of all of its duties), the court held that even though the OBPA had made it impossible for the government to perform its obligations under petitioners' lease contracts, petitioners

[15] The sole exception to the general rule that a defendant's breach or repudiation of a contract entitles the plaintiff to restitution is where the palintiff has fully performed his obligations and the only performance due by the defendant is the payment of a sum certain. *See Restatement (Second) of Contracts* § 373(2) & cmt. b; 5 Arthur Linton Corbin, *Corbin on Contracts* § 1110, at 587 (1964). That is not the case here, where the performance due from the government was timely and fair consideration of petitioners' plans and applications.

[16] In accord with hornbook law, *see, e.g.*, *Restatement (Second) of Contracts* §§ 344(c), 373(1), the government conceded below that if restitution applies, each party "must 'restore' to the other the value of any benefit received from the other party's performance," U.S. Fed. Cir. Br. 42, and that, under this standard, the government benefited by over $156 million from petitioners' performance, *id.* at 43.

were nonetheless not entitled to restitution of the money they had paid because the OBPA was not the "operative cause," Pet. App. 4a, for the government's failure to approve the POE:

> Whatever restraints on secretarial actions were imposed by the OBPA *essentially had no* effect upon these OCS leases because exploration could not proceed without North Carolina's concurrence in the POE's CZMA consistency certification or the override provided by law.
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> Lessees have not established that their inability to obtain secretarial approval of the POE and to undertake exploratory activity was caused by the moratorium rather than by the fact that they were unable to provide the necessary state concurrence to their certification of CZMA compliance. And even if the Secretary had felt constrained in acting on the application by the provisions of the OBPA, the law is clear that, had he been free to act, he could not have issued any permits for exploration so long as North Carolina's objections remained in force.

Id. at 14a-15a (emphasis added). Although North Carolina's CZMA objection might have been relevant if petitioners had sought expectation damages based on lost profits or the market value of the lost oil and gas, it is utterly *irrelevant* as a matter of law to their claim for restitution.

a. The court of appeals' decision below contradicted hornbook law that, where a defendant has placed himself in total breach, either by a repudiation or through a total failure to perform, a plaintiff need not have been able to have performed his own obligations and or to have satisfied any conditions precedent to the repudiator's performance in order to obtain restitution.

> A repudiation or other total breach by one party enables the other to get a judgment for damages or for restitution without performing acts that would otherwise have been conditions precedent. It is no longer necessary for the plaintiff to perform or to tender performance. This is true whether the repudiation is in express words or is by an act that makes performance by the repudiator apparently impossible or very improbable.

4 Corbin, *supra*, § 977, at 920-22 (footnote omitted). *Accord* 12 Walter H. E. Jaeger, *Williston on Contracts* § 1454, at 3 (3d ed. 1970); *Restatement (Second) of Contracts* § 253(2) (repudiation "discharges the other party's remaining duties to render performance"). See also *Livi Steel, Inc.* v. *Bank One, Youngstown, N.A.*, 584 N.E.2d 1267, 1269-70 (Ohio Ct. App. 1989) (same).

Indeed, restitution is available following a repudiation or other total breach even if the injured party not only failed to "perform[] acts which would otherwise have been conditions precedent," but also in fact *could not* have performed those acts.

> A contract . . . may be rescinded, and the purchase moneys paid in advance may be recovered, on the failure of the seller to perform, even though the purchaser could not have performed. *In an action to rescind and recover payments made on account of the purchase price*[,] *it is enough to show a breach by the seller.*

Weintraub v. *Rungmar Realty Corp.*, 231 N.Y.S.2d 241, 244 (N.Y. Sup. Ct. 1962) (emphasis added); see also *id.* (purchaser entitled to restitution of down payment where seller was in breach, even though buyer could not have performed his obligation to pay balance of purchase price at closing). *Accord Bertrand* v. *Jones*, 156 A.2d 161, 167-69 (N.J. Super. 1959) (same); *Bu-Vi-Bar Petroleum*

Corp. v. *Krow*, 40 F.2d 488, 491 (10th Cir. 1930) (plaintiff is "excused from the necessity of performing or being ready to perform" upon defendant's repudiation); *Bigler* v. *Morgan*, 77 N.Y. 312, 318-19 (N.Y. 1879). See also 4 Corbin, *supra*, § 978, at 928. In short, where a defendant has repudiated his duties under a contract or otherwise committed a total breach, a plaintiff need not have been able to perform his end of the bargain, let alone actually have satisfied any "conditions precedent" to the repudiating party's obligations, in order to obtain restitution.[17]

In this case, the OBPA categorically repudiated the government's promises to "timely and fairly consider" plans and applications (including the Manteo Unit's POE) that petitioners submitted, and the OBPA also compelled the Secretary to commit an "actual breach" by withholding timely approval of the Manteo Unit's POE. The United States, having repudiated and made its own performance of its contractual obligations impossible, thus was in "total breach." See *supra* at 25-31. Even if the court of appeals had been correct that peti-

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[17] Indeed, even when the plaintiff is in breach and thus has not fulfilled a condition for the defendant's performance, he may nonetheless obtain restitution of any benefit conferred on the repudiating defendant. *See Restatement (Second) of Contracts* § 374; 12 Walter H.E. Jaeger, *Williston on Contracts* § 1454, at 3-5 (3d ed. 1970). The rule is, of course, different if expectation damages (rather than an award of restitution) are sought. *See, e.g., Weintraub* v. *Rungmar Realty Corp.*, 231 N.Y.S.2d 241, 244 (N.Y. Sup. Ct. 1962). "In an action for breach by an unconditional repudiation it is still a condition precedent to plaintiff's right to a *judgment for damages* that he should have the ability to perform all such conditions." 4 Arthur Linton Corbin, *Corbin on Contracts* § 978, at 924 (1951) (emphasis added). *See also id.* § 978, at 928 ("If the plaintiff could not have performed in any case, he will not be given damages for the defendant's failure to perform . . . ."); *Alabama Football, Inc.* v. *Greenwood*, 452 F. Supp. 1191, 1196 (W.D. Pa. 1978) (same).

tioners had failed to satisfy "a prerequisite to obtaining the necessary permits and licenses," Pet. App. 15a—but see *infra* at 43-45—petitioners were nonetheless entitled to restitution (as opposed to other forms of relief which they did not seek). See, *e.g.*, *Alabama Football, Inc.* v. *Greenwood*, 452 F. Supp. 1191, 1196 (W.D. Pa. 1978) (awarding restitution even though damages not available); *Weintraub*, 231 N.Y.S.2d at 244 (same.) The result required here was restitution by the government, not "the federal government's confiscation of Marathon's payment[s]." Pet. App. 20a-21a (Newman, J., dissenting).

b. The court of appeals' fundamental error in this case appears to stem from its misplaced reliance on *Sun Oil Co.* v. *United States*, 572 F.2d 786 (Ct. Cl. 1978), which it cited as the sole authority for the "harmless error" exception it grafted onto the ordinary rules governing restitution. See Pet. App. 15a. *Sun Oil* is, however, simply inapposite. In that case, three OCSLA lessees sought *damages* resulting from the government's alleged delay in approving a POD and other permit applications which they had submitted. See *Sun Oil*, 572 F.2d at 793.[18] They did *not* seek restitution based on the government's asserted breach; indeed, after the DOI's allegedly tardy approval of their POD and drilling platform permit, they continued to pursue their rights under the lease, installed the drilling platform, and eventually commenced production. See *id.* at 799-800. The Court of Claims rejected the plaintiffs' claim for delay damages first on the ground that no breach of their lease had occurred be-

[18] Delay damages are a form of expectation damages which compensate for additional costs incurred or revenues lost by reason of the delay. *See* 5 John C. McBride & Thomas J. Touey, *Government Contracts* § 37A.10, at 37A-1 (1998); *Bates & Rogers Constr. Corp.* v. *Greeley & Hansen*, 486 N.E.2d 902, 904-05 (Ill. 1985).

cause the delays were both justified and permitted under the OCSLA. See *id.* at 804. The court also concluded that the *Sun Oil* plaintiffs could not recover delay damages because the construction of their platform was not completed until after the government had approved their POD and permit. See *id.* at 806. This alternative holding—that "any delay in plan and permit approval [was] of little or no significance since such a delay would not delay the ultimate completion of the project," *id.*—is manifestly relevant to a plaintiff's claim for expectation damages. See *supra* at 41 n.17. It, however, has no application whatsoever where, as here, the plaintiffs' claim is strictly for restitution based on the government's repudiation and total breach of its contract.

c. The decision below is also based on a fundamental misapprehension of the facts in this case. As a factual matter, North Carolina's CZMA objection to the Manteo Unit's POE was not—and could not have been—the reason for the Secretary of the Interior's failure to perform his contractual duty to "timely and fairly consider" the Manteo Unit's POE and to approve it if it complied with the OCSLA. Petitioners submitted their POE for the Manteo Unit, which included only four of their five North Carolina OCS tracts, on August 20, 1990. On September 28, 1990—30 days after the submission was deemed complete, see Pet. App. 193a—the DOI reported that, even though the POE was "approvable in all respects," *id.* at 194a, the Secretary was withholding approval *in order to comply with the OBPA*.

> The [Manteo Unit] Plan, together with its supporting information, is deemed to be approvable in all respects. *The Outer Banks Protection Act (OBPA) of 1990, however, prohibits the approval of any Exploration Plan at this time.* Under Section 11(c) of the Outer Continental Shelf Lands Act, we are re-

> quired to approve an Exploration Plan unless it is inconsistent with applicable law or because it would result in serious harm to the environment. Because we have found that [the Manteo Unit's] Plan fully complies with the law and will have only negligible effect on the environment, we are not authorized to disapprove the Plan or require its modification as you suggest.

Id. (emphasis added). By its own admission, the reason for the government's refusal to perform its obligations under petitioners' lease contracts and the OCCLA was the need to comply with the OBPA, *not* North Carolina's CZMA objection. See also J.A. 180. Indeed, the government *conceded* below that, absent the OBPA, the Secretary would have approved the Manteo Unit's POE within the 30-day period set out in the OCSLA. See U.S. Fed. Cir. Br. 39. The court of appeals' *post hoc* attempt to attribute the government's OBPA-compelled breach of petitioners' lease contracts to a cause that was *not* the one that the federal government cited when it acted must accordingly be rejected. Cf. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947) (courts "must judge the propriety of [the agency's] action solely by the grounds invoked by the agency"); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-69 (1962) (same).

Indeed, it would have been *impossible* for North Carolina's CZMA objection to have been the cause of the Secretary's refusal to approve the Manteo Unit's POE in September 1990—*i.e.*, within the 30-day period in which the Secretary is required to approve a POE that meets the requirements of the OCSLA, 43 U.S.C. § 1340(c)(1). North Carolina did not file its CZMA objection to the Manteo Unit's POE until November 19, 1990, see J.A. 141, nearly *two months* after the date that DOI would,

by its own admission, have been required to approve—and would have approved—the POE, but for the OBPA.

Finally, the decision below also blurred the different requirements imposed by the OCSLA at each stage of exploration and development of an OCS lease tract. A lessee's failure to obtain a State's CZMA concurrence is *not* a ground under the OCSLA for withholding approval of an otherwise approvable *POE*. Although the OCSLA expressly prohibits the Secretary from granting a drilling permit or approving a *POD* without a State's CZMA concurrence, it does *not* restrain him from taking the first step—approving a POE that complies with the OCSLA—even in the face of a State's CZMA objection. Compare 43 U.S.C. § 1340(c)(1) (Secretary "shall" approve a POE that is consistent with the OCSLA) with *id.* § 1340(c)(2) (Secretary shall not grant any license or permit for activity described in a POE unless State concurs under the CZMA), and *id.* § 1351(h)(1)(B) (same for a POD). Indeed, during the relevant period, the DOI's own regulations made clear that unlike an application for a drilling permit, a POE complying with the OCSLA was approvable notwithstanding a State's CZMA objection. Compare 30 C.F.R. § 250.33(i) (1993) (POE) with *id.* § 250.33(p) (1993) (drilling permit application).

3. The court of appeals also fundamentally erred by treating petitioners' claim for restitution as being based solely on the Secretary's refusal to act on the single POE that was submitted for the Manteo Unit rather than on the OBPA's wholesale repudiation of *all* of the government's obligations under petitioners' leases. As explained above, the OBPA not only prohibited the Secretary from carrying out his duties under petitioners' leases with respect to the Manteo Unit's POE, but also anticipatorily repudiated the government's contractual obligations as to every other POE, drilling permit application, and POD

that petitioners were entitled to submit. See *supra* at 25-31. The statement of the court of appeals that "the OBPA essentially had no effect" required bald *speculation* that North Carolina would have raised a CZMA objection to *every* plan that petitioners might have proposed, whether it involved the Manteo Unit or their one non-Manteo tract, and that the Secretary of Commerce would have sustained each objection.

Moreover, even if this guess were correct, it is *irrelevant* to whether the OBPA repudiated petitioners' leases and placed the United States in total breach and thus as to whether *restitution* (rather than an award of expectation damages) is available in this case. See *supra* at 39-42. "[R]estitution at law is not limited to situations in which the damages remedy is regarded as inadequate," I Palmer, *supra*, § 4.7, at 427, or is unavailable, see, *e.g.*, *Weintraub*, 231 N.Y.S.2d at 244. Where expectation damages are uncertain or difficlt to ascertain, however, the commentators agree that denying restitution on that basis would be an especially "serious injustice," 5 Corbin, *supra*, § 1110, at 590. *Accord Restatement of Contracts* § 350 cmt. b (1932); I Palmer, *supra*, § 4.1, at 368; *id.* § 4.7, at 428. See also *Acme*, 347 F.2d at 530 n.29 (restitution available even where expectation damages are "too speculative"). Here, the government's repudiation and breach made expectation damages difficult to ascertain because it is difficult to know how, absent the OBPA, North Carolina or the Secretary of Commerce would have treated CZMA issues raised in a modified Manteo Unit POE or different POEs, drilling permit applications, or PODs; how petitioners would have sought to satisfy any reasonable concerns; or whether (and how much) oil or gas ultimately would have been discovered. It is axiomatic, however, that a defendant who has repudiated or otherwise totally breached a contract should not be "permitted to escape under cover of a demand for nonexistent certainty." *Palmer* v. *Connecticut Ry. & Lighting Co.*, 311 U.S. 544, 560-61 (1941). See also *Locke* v. *United States*, 283 F.2d 521, 524 (Ct. Cl. 1960) ("The defendant who has wrongfully broken a contract should not be permitted to reap advantage from his own wrong by insisting on proof which by reason of his breach is unobtainable."). It was clear legal error by the court below effectively to limit petitioners to expectation damages remedies that the government's breach made unprovable.

II. EVEN IF THE OBPA DID NOT PLACE THE GOVERNMENT IN BREACH, PETITIONERS ARE INDEPENDENTLY ENTITLED TO RESTITUTION UNDER THE DOCTRINE OF SUPERVENING IMPRACTICABILITY.

As explained above, the enactment of the OBPA legislatively repudiated the government's obligations under petitioners' leases and made it impossible for the government to uphold its end of the bargain with petitioners. See *supra* at 25-31. Under this Court's decision in *Winstar*, the United States thus repudiated its contract and was in total breach. See *United States* v. *Winstar Corp.*, 518 U.S. 839, 870 (1996) (plurality opinion); *id.* at 918 (Breyer, J., concurring); *id.* at 919 (Scalia, J., concurring in judgment). However, even if the government's enactment of the OBPA is viewed not as having breached petitioners' leases, but instead as a supervening governmental action which made the government's performance of its own obligations impracticable, petitioners are nonetheless entitled to restitution.

It is hornbook law that when a party's performance of its obligations under a contract is made impracticable or impossible by supervening events for which it is not responsible, such as post-contract legislation, that party is

excused from performing. See, *e.g.*, *Restatement (Second) of Contracts* § 261 (1981) ("Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged . . . ."); *id.* § 264 (Governmental regulation or order that makes performance impracticable "is an event the non-occurrence of which was a basic assumption on which the contract was made.").

However, it is equally well established that "a party who is excused from performance by supervening impossibility is not privileged to keep something for nothing, and restitution is an available remedy against him." 5 Arthur Linton Corbin, *Corbin on Contracts* § 1102, at 549 (1964). *Accord Restatement (Second) of Contracts* § 377 & cmt. a (party entitled to restitution when other party's performance excused by supervening impossibility); *Restatement of Restitution* § 108(c) (1937) (same); 18 Walter H.E. Jaeger, *Williston on Contracts* § 1972, at 224-27 (3d ed. 1978) (same). Thus, when one party's performance of a contract becomes impracticable or impossible, rescission of the contract and restitution of any consideration provided to it is an appropriate remedy. See, *e.g.*, *Winstar Corp.* v. *United States*, 994 F.2d 797, 818-19 (Fed. Cir. 1993) (Newman, J., dissenting), *rev'd on reh'g*, 64 F.3d 1531 (Fed. Cir. 1995) (*en banc*), *aff'd*, 518 U.S. 839 (1996); *Bishop Trust Co. Ltd.* v. *Kamokila Dev. Corp.*, 555 P.2d 1193, 1196 (Haw. 1976); *Aerojet-General Corp.* v. *Askew*, 453 F.2d 819, 831 (5th Cir. 1971).[19]

[19] Following this Court's decision in *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996), the government abandoned its argument that it was immune from liability under the sovereign acts doctrine. Even if the doctrine applied, however, it would merely "relieve[] the Government as contractor from the traditional blanket rule that a contracting party may not obtain discharge if its own act rendered performance impossible" and "place the Government as contractor on par with a private contractor in the same circumstances." *Id.* at 904 (plurality opinion). As this Court made clear in *Winstar*, under the " 'law applicable to contracts between private individuals,' " *id.* at 895 (plurality opinion), when the government asserts a sovereign acts defense, the rules governing impracticability nonetheless apply. *See id.* at 904-10 (plurality opinion). As the text above explains, when a party's performance becomes impracticable, those rules require restitution.

In this case, the OBPA expressly prohibited the Secretary, for an indefinite period, from performing *any* of his duties under petitioners' leases and required him not to approve the Manteo Unit's POE within the time period prescribed by the OCSLA and incorporated into the leases by reference. Even if the OBPA did not breach petitioners' leases—which it most certainly did—it at the very least rendered it impracticable or impossible for the government to perform its duties under those leases. In that circumstance, although the government would be excused from performance and thus would not be liable for expectation damages, petitioners would nonetheless be entitled to restitution of the $156 million they had paid. In short, whether the OBPA repudiated the government's contracts with petitioners, or merely made its performance impracticable, it was not entitled to "keep something for nothing." 5 Corbin, *supra*, § 1102, at 549.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

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Nos. 99-244 and 99-253

IN THE

Supreme Court of the United States

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,
AND
MARATHON OIL COMPANY,

Petitioners,

v.

THE UNITED STATES,

Respondent.

On Writ of Certiorari To the United States Court of Appeals For the Federal Circuit

BRIEF FOR PETITIONER MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.

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QUESTION PRESENTED

Whether the Federal Circuit erred in holding – contrary to decisions of this Court, other courts of appeals, and state courts, as well as the *Restatements* and leading treatises – that petitioner could not obtain restitution of the $78 million paid to the United States for oil and gas leases following the enactment of a statute that the trial court found "clearly reduce[d] the value and materially alter[ed] the structure and framework" of those leases, because (1) petitioner had not proved that this material breach of its leases "caused" it any injury and (2) Congress had repealed the statute after petitioner filed suit asserting material breach?

PARTIES TO THE PROCEEDING AND AMENDED RULE 29.6 DISCLOSURE

The following were parties to the proceeding in the court of appeals: The United States, Mobil Oil Exploration & Producing Southeast, Inc., and Marathon Oil Company.

All of the stock of Mobil Oil Exploration & Producing Southeast, Inc., is owned by its immediate parent, Mobil Exploration & Producing North America Inc. All of the stock of Mobil Exploration & Producing North America Inc. is owned by Mobil Corporation, and all of the stock of Mobil Corporation is, in turn, owned by ExxonMobil Corporation, a publicly held company.

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BRIEF OF PETITIONER
MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.

OPINIONS BELOW

The initial opinion of the court of appeals is reported at 158 F.3d 1253. Petition Appendix ("Pet. App.") 22a. The revised opinion of the court of appeals is reported at 177 F.3d 331. Pet. App. 1a. The order of the court of appeals granting the petition for rehearing for the limited purpose of revising the court's initial opinion and denying the suggestion of Mobil Oil Exploration & Producing Southeast, Inc. ("Mobil") for rehearing in banc is also reported at 177 F.3d 331. Pet. App. 94a. The April 1, 1996, opinion of the United States Court of Federal Claims, which was reversed by the court of appeals, is reported at 35 Fed. Cl. 309. Pet. App. 40a.

JURISDICTION

The decision of the court of appeals that was the subject of the petition for a writ of certiorari was entered May 13, 1999. That decision revised the court of appeals' October 15, 1998, opinion pursuant to a timely petition for rehearing filed on November 25, 1998. The petition for a writ of certiorari was filed on August 10, 1999, and granted on November 15, 1999. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provisions of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331 *et seq.*, and of the Outer Banks Protection Act ("OBPA"), Pub. L. No. 101-380, § 6003, 104 Stat. 484, 555 (1990), *repealed by* Pub. L. No. 104-134, 110 Stat. 1321-177 (1996), appear in the Addendum to this brief.

STATEMENT OF THE CASE

Mobil and Marathon Oil Company ("Marathon"), petitioner in No. 99-253, each paid the United States more than $78 million in 1981 to acquire one-third interests in five oil and gas leases on the Outer Continental Shelf ("OCS") offshore North Carolina.[1] Fed. Cir. App. 180-81, 183-84. In 1990, Congress enacted the OBPA, which the Court of Federal Claims found "compelled governmental breach by non-performance accompanied by an anticipatory repudiation thereby giving a rise to 'total breach.'" Pet. App. 71a. The Federal Circuit held that, notwithstanding this "find[ing]," Mobil and Marathon were not entitled to restitution of the monies that they had paid to the Government for their leases because they had not proved that the OBPA, prior to its 1996 repeal, was the exclusive "cause" of their inability to explore the oil and gas resources on the North Carolina OCS.

The Facts Giving Rise To This Case

The OCSLA authorizes the United States Department of the Interior ("DOI") to sell leases that "*entitle* the lessee [*inter alia*] to explore [for] ... oil and gas" on the OCS, subject only to the lessee's due diligence. 43 U.S.C. § 1337(b)(4) (emphasis added). Section 1 of Mobil's and Marathon's leases provides that they are issued "pursuant to" and "subject to" the OCSLA. OCS Lease § 1, Marathon Pet. App. 175a. Thus, consistent with § 1337(b)(4), the leases give "the lessee the exclusive right and privilege to drill for, develop, and produce oil and gas resources ... in the submerged lands of the [OCS]." OCS Lease § 2.

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[1] Amerada-Hess Corporation, which settled its claims against the United States, *see* p. 13 n.12, *infra*, held the remaining one-third interest in the five leases.

Before conducting a sale of OCS leases, DOI assesses all the environmental impacts that are expected following the sale, as required by the OCSLA, 43 U.S.C. § 1346(a), and the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq*. Following such an assessment, DOI conducted a lease sale in August 1981 at which Mobil and Marathon bought their interests in the five North Carolina OCS leases. Fed. Cir. App. 180-81, 183-84. In total, the Government collected more than $350 million in bonus payments at that sale. *Id*. at 186.[2] The leases purchased by Mobil and Marathon have 10-year primary terms and are extended for as "long thereafter as oil or gas is produced ... in paying quantities." OCS Lease § 3, Marathon Pet. App. 176a.

The first step toward oil and gas production under an OCS lease is the submission to DOI of a plan of exploration ("POE"). Under OCSLA § 1340(c)(1), DOI "*shall*" approve a POE within 30 days after it is submitted, unless the proposed activities (1) "would probably cause serious harm or damage" to the environment, *see* OCSLA § 1334(a)(2), and (2) those activities cannot be modified to avoid such harm or damage. In these circumstances, which have *never* occurred in the history of the OCS leasing program, J.A. 176, DOI may cancel the lease and pay the owner the compensation specified in OSCLA § 1334(a)(2)(C) – *i.e.* the lesser of compensation for all expenditures on the leases with

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[2] *See Watt v. Energy Action Educ. Found.*, 454 U.S. 151 (1981) (upholding DOI's front-end cash bonus system for issuing OCS leases). Under the OCS leasing program (1953-present), the Government has received more than $60 billion in up-front bonuses alone. *See* U.S. Department of the Interior Minerals Management Service, Mineral Revenues 1998, at 51 tbl.20 (1999) (visited Dec. 7, 1999) <http://www.rmp.mms.gov/library/statroom/PDFDocs/mrr98fin.pdf>. The Government has also received $61.5 billion in royalties and $1.7 billion in rents over the life of the program. *See id*. at 35, 48-49, tbls.13 & 18.

interest or the fair market value of the leases. As the Government has conceded,[3] the 30-day period for POE approval means that DOI cannot undertake new environmental studies to decide whether to approve a POE. Moreover, OCSLA § 1346(d) requires DOI to base its decision on the information that is "available" at the time of its POE decision. *See also* Marathon Pet. App. 201a.[4]

Under OCSLA § 1340(c) and § 1 of its leases, *see* p. 2, *supra*, Mobil was entitled to have a POE approved within 30 days. However, in 1989, acting on behalf of Marathon and six other companies holding North Carolina OCS leases, Mobil agreed with DOI and the State to submit a "draft" POE for what would have been the first exploratory well offshore North Carolina in order to give DOI an opportunity to prepare an analysis of the environmental impacts associated with the proposed well. J.A. 79-85. The *2000-page* Environmental Report produced by DOI in June 1990 constitutes, in DOI's own words, "the most extensive and intensive environmental examination that had ever been afforded an exploration well in the OCS program." J.A. 179. After reviewing that report, DOI determined that Mobil's proposed exploration would not result in any significant environmental impacts. J.A. 139-40, 179. Accordingly, Mobil's POE was deemed to have "complied in all respects with [DOI] regulations ... governing [POEs]," and "[t]he Plan, together with its supporting information, [was] deemed to be approvable in all respects." Marathon Pet. App. 194a.

However, on August 18, 1990, the day before Mobil submitted its "final" POE to DOI, Congress enacted the OBPA. That Act, without amending the OCSLA -- and, indeed, being directed solely at the North Carolina OCS leases – prohibited DOI from approving any POE, POD, or permit to drill until the later of October 1, 1991, or 45 days of continuous congressional session following the Secretary's submission to Congress of a certificate that he had received a report from the Environmental Sciences Review Panel established by the OBPA and had concluded that sufficient information was available to allow him to carry out his responsibilities under the OCSLA.

The legislative record clearly reveals the intent underlying the OBPA. Prior to 1990, congressional appropriations moratoria had prohibited exploration on OCS leases offshore Florida and Alaska.[5] In June 1990, President

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[3] *See* Letter of February 28, 1990, from Michael Deland, Chairman of the Council on Environmental Quality to Rep. Walter Jones (Exh. 6 to Third Party Plaintiff's Motion for Partial Summary Judgment, filed April 12, 1994).

[4] If exploration is successful, lessees submit plans of development ("PODs") before proceeding with development and production of oil or gas. DOI may disapprove a POD, *inter alia*, if development and production "would probably cause serious harm or damage ... to the marine, coastal or human environments." OCSLA § 1351(h)(1)(D). If DOI disapproves a POD for this reason and it cannot be modified to avoid such risk of harm, DOI must ultimately cancel the lease and pay compensation to the lessee. OCSLA § 1351(h)(2)(C).

[5] *See, e.g.*, Pub. L. No. 100-46, § 110, 102 Stat. 1774, 1801 (1988) (Florida); Pub. L. No. 101-121, § 111, 103 Stat. 701, 702 (1989) (Alaska). The Florida and Alaska moratoria prompted the filing of claims by two other Mobil affiliates, as well as other companies that were originally plaintiffs in this litigation. Before the issues raised in those claims were decided, the Government paid nine of those plaintiffs $175 million, representing more than 100% of the bonuses and rentals that they had paid for their leases, in return for cancellation of their OCS leases. Fed. Cir. App. 973. The Government also paid Conoco Inc. $16.9 million to resolve its Alaska, Florida, and North Carolina claims, *id.* at 982, and it settled all of the claims of Shell Oil Company subsidiaries for undisclosed consideration, *id.* at 986.

Bush directed DOI to "[b]egin cancellation of *existing* leases off Florida" and to compensate the leaseholders by implementing a "joint federal-state buy-back" of those leases. J.A. 100. Representative Walter Jones of North Carolina, then Chairman of the House Merchant Marine and Fisheries Committee, vigorously protested the omission of the North Carolina OCS from the President's "moratorium," J.A. 102, as did North Carolina's Governor, J.A. 104. However, in July 1990, the House Appropriations Subcommittee rejected Rep. Jones' request for a ban on exploration offshore North Carolina, like those imposed on Florida and Alaska leases.

In response, Rep. Jones "managed to wrangle" the OBPA into the Oil Pollution Act of 1990, 33 U.S.C. § 2701 *et seq.*, over which his committee had jurisdiction. 136 Cong. Rec. 22,281 (1990) (Rep. Studds); *see also* id. at 22,275 (Rep. Regula) ("[The OBPA] was not in the House bill, was not in the Senate bill, was not within in the scope of the conference. It was simply added."); *id.* at 21,726 (1990) (Sen. Dole) (observing that the bill "includes a last minute moratorium on a promising lease in the Outer Continental Shelf").

Rep. Jones and the OBPA's other supporters made clear that they intended to achieve for North Carolina a "moratorium" like those that Congress had adopted for Florida and Alaska. *See, e.g.*, H.R. No. 101-653, 101st Cong., 2d Sess. 163 (1990) (Conf. Report) (describing the OBPA as a "moratorium"). In successfully opposing a separate floor vote on the OBPA, Rep. Jones stated that "in his offshore moratoria proposal, the President has forgotten about North Carolina. Well, I have not." 136 Cong. Rec. 22,275 (1990). Representative Rose of North Carolina likewise explained the purpose of the OBPA:

> Governor Martin . . . was horrified when the President stopped offshore drilling off the coast of ... Florida and left North Carolina out. And so he ... wrote to Mr. Jones, and Mr. Jones did exactly what [Governor Martin] asked him to do, he put [the OBPA] in this legislation.

Id. at 22,277 (Rep. Rose); *see also id.* at 22,272 (Rep. Miller) (describing the OBPA as a "moratorium"); *id.* at 22,278 (Rep. Young) (same); *id.* at 22,279 (Rep. Lagomarsino) (same); J.A. 113 (DOI Secretary Lujan denouncing the OBPA as a "*de facto* moratorium on any exploratory activity").

The legislative record also makes clear that the OBPA was aimed specifically at Mobil's proposed exploratory well:

> Although encompassing the entire area offshore the State of North Carolina, the [OBPA] essentially addresses the proposal by the Mobil Oil Corporation and seven partners to drill an exploratory well about 40 miles off Cape Hatteras.

H.R. No. 101-653, 101st Cong., 2d Sess. 161 (1990) (Conf. Report); *see also* OBPA § 6003(b)(7) (referring by name to DOI's June 1990 Environmental Report prepared pursuant to an agreement with "the Mobil Oil Company"); 136 Cong. Rec. 22,275 (Rep. Regula noting that the "real issue" underlying the OBPA was Mobil's proposed well).

In these circumstances, it is hardly surprising that DOI Assistant Secretary O'Neal, the official with direct responsibility for the OCS program, described the OBPA as an act of "bad faith" that had "no scientific basis" and was inconsistent with the terms of the North Carolina OCS leases. J.A. 182.

Application Of The OBPA

Although OBPA § 6003(e)(2) required the newly established Review Panel to submit a report to the Secretary by February 19, 1991, that report was not completed until January 22, 1992. J.A. 149. Moreover, contrary to the OBPA, the panel did not focus on the Secretary's responsibilities under the OCSLA regarding exploration. For example, the panel recommended extensive studies focusing on the impacts of onshore development, even though approval of the Mobil POE could not cause such impacts. J.A. 158-60.[6]

Following receipt of the Panel's report, Secretary Lujan certified on April 2, 1992, that "the information that currently exists is adequate to allow me to make a reasoned decision about the activities presently proposed [*i.e.*, the Mobil POE] to take place offshore North Carolina." Marathon Pet. App. 201a. Despite this unqualified conclusion, the Secretary refused to allow drilling of even the single well proposed in Mobil's POE until the completion of all the studies recommended by the Panel. *Id.* at 415. The last of those studies was not completed until July 1994. J.A. 194.

Moreover, Secretary Lujan's April 1992 decision dealt only with "the first [Mobil] exploratory well." Marathon Pet. App. 201a. DOI estimated that as many as

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[6] Secretary Lujan later recognized in his April 2, 1992, report to Congress under the OBPA that the Panel's "definition of adequacy [of environmental information] ... was far more restrictive and narrow than [his] charge under the [OCSLA]"; he also acknowledged that "[t]he OCSLA requires that the timing and location of exploration ... be based on a consideration of existing information ...." Marathon Pet. App. 201a.

eight additional delineation wells would be required just to determine the feasibility of production, and many more wells would have been necessary to produce the underlying oil or gas. J.A. 55. The OBPA Panel had determined that additional studies would be required before deciding whether to permit *any* of these additional wells, Marathon Pet. App. 198a-204a, and the Secretary told Congress that further studies would "not begin in earnest prior to reviewing the initial exploration drilling," *id.* at 201a-202a. Accordingly, the Government conceded below, *see* Federal Circuit Brief at 18, 23, 29-30, that after the Secretary's April 1992 certification the OBPA continued to bar all of these subsequent exploration and development-and-production activities.

After the enactment of the OBPA, Mobil faced another potential barrier to its exploration well based on the Coastal Zone Management Act ("CZMA"), 16 U.S.C. §§ 1451 *et seq*. Pursuant to § 1456(c)(3)(B), North Carolina on November 19, 1990, objected to Mobil's exploratory drilling on the ground that it would not be consistent with the State's coastal management program. J.A. 141.[7] This objection was based in large part upon the OBPA's "findings" that there were insufficient environmental studies to proceed with drilling. J.A. 147. Under the CZMA, DOI was thus barred from issuing the drilling permit contemplated by Mobil's POE, unless Mobil successfully appealed to the Secretary of

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[7] On July 17, 1990, North Carolina also objected to Mobil's application to EPA for a permit under the Clean Water Act ("CWA"), 33 U.S.C. § 1311, for the discharges into ocean waters associated with exploration. J.A. 106. Unlike the State's later objection to Mobil's POE, North Carolina's objection to the CWA permit would not have barred exploratory drilling. *See* J.A. 331 (discussing the State's proposal for a "no discharge" approach contemplating the barging of byproducts and wastes to shore).

Commerce or amended its POE to achieve consistency by conducting the additional studies demanded by North Carolina.[8] On September 2, 1994, the Secretary of Commerce rejected Mobil's appeal. The Secretary's decision, like North Carolina's, was based largely on the OBPA. *See, e.g.*, J.A. 224, 227, 232, 239, 244, 247.[9]

Proceedings In The Court Of Federal Claims

Confronted with Secretary Lujan's April 1992 decision interpreting the OBPA as requiring years of additional studies not only for the first exploration well offshore North Carolina, but also for *every* subsequent exploration, delineation, and production well, Mobil and all the other North Carolina OCS lessees filed suit under 28 U.S.C. § 1491 in the United States Court of Federal Claims. They alleged, *inter alia*, that the enactment and application of the OBPA constituted a material breach by anticipatory repudiation of their leases that entitled them to restitution of all the monies that they had paid to acquire and maintain the leases. *See* Mobil Complaint ¶ 1. The Government defended

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8 *See Secretary of the Interior v. California*, 464 U.S. 312, 339 (1984) (discussing the application of the CZMA to OCS exploration activities).

9 Mobil and the other lessees filed an action in District Court challenging the Secretary of Commerce's rejection of their CZMA appeal. In early 1996, the District Court remanded the case to the Secretary of Commerce for a determination whether the administrative record should be reopened to receive the two completed studies required by the OBPA scientific review panel. *Mobil Oil Exploration and Producing Southeast, Inc. v. Secretary of Commerce*, Civ. No. 95-93 SSH (D.D.C.), Order filed March 11, 1996. On December 8, 1999, almost four years after the district court's remand – but only three weeks after this Court granted certiorari in this case – the Secretary of Commerce issued a decision refusing to reopen the record.

principally on the ground that under the terms of the OCS leases, as construed pursuant to the unmistakability and sovereign acts doctrines,[10] the OBPA could be applied to their leases even though it was enacted nine years after they were issued.

On April 1, 1996, the Court of Federal Claims granted summary judgment for Mobil and the other plaintiffs on their material breach theory. Pet. App. 40a. The court rejected the Government's principal argument that § 1 of the leases – making them "subject to" the OCSLA and "all other applicable statutes and regulations" – allowed the Government through future legislation, like the OBPA, to impose new restrictions on OCS activities:

> [T]he lease contracts here at issue cannot be construed to allow for such drastic unilateral interference by the government, through passage of highly restrictive legislation, the OBPA, with the lessees' bargained for rights of exploitation.
>
> * * *
>
> Moreover, common sense suggests that no sophisticated oil and gas company . . . would knowingly agree to pay the huge, upfront considerations here involved for such tenuous and unilaterally interruptible drilling rights.

Pet. App. 62a.

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10 *See generally United States v. Winstar Corp.*, 518 U.S. 839 (1996).

Having determined that the OBPA was an "external factor" that "cannot be read into [Mobil's] unambiguous lease terms," Pet. App. 63a, the court concluded that the OBPA constituted an anticipatory repudiation and material breach of the companies' OCS leases:

> Clearly, the OBPA imposed severe, burdensome, new conditions upon the DOI's obligation under OCSLA to approve POEs offshore North Carolina, which were not contemplated by the parties when the leases were executed. Therefore, the court ... finds that compliance with the OBPA compelled governmental breach by non-performance accompanied by an anticipatory repudiation thereby giving rise to "total breach."

Pet. App. 71a; *see also* Pet. App. 63a (OBPA "clearly reduce[d] the value and materially alter[ed] the structure and framework of plaintiffs' North Carolina lease acquisitions").

The Court of Federal Claims also found that the OBPA "was narrowly tailored to target the specific contracts and sought to abate the accompanying rights here at issue." Pet. App 86a. It thus rejected the Government's argument under the sovereign acts doctrine, holding that the OBPA "was not an act of public, general applicability" but instead was "specifically enacted to delay indefinitely plaintiffs' exploration of the OCS offshore North Carolina." Pet. App. 91a.[11]

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[11] The Government paid so little attention to the CZMA in briefing and arguing summary judgment that the court did not directly address that statute. It did hold, however, that because the OBPA "legislatively barred [DOI] from performing," it was "not necessary for plaintiffs [even] to have actually submitted such (...continued)

Following additional proceedings regarding remedy, judgment was entered for Mobil in the amount of $78,257,565, J.A. 339 – restitution (without interest) of the bonus monies Mobil paid to the Government in 1981 to acquire its North Carolina leases.[12]

Proceedings In The Federal Circuit

The Government appealed to the Federal Circuit. However, in that court the Government abandoned its principal arguments based on its interpretation of the OCS leases, as well as the sovereign acts and unmistakability doctrines, thus conceding that the OBPA was targeted at and inconsistent with Mobil's lease rights. Instead, as the last of its three arguments, the Government contended that the OBPA could not sustain Mobil's claims of material breach and restitution because Mobil was independently barred by the CZMA from obtaining the drilling permit necessary to conduct the exploration contemplated by its POE. In advancing this argument, the Government did not contend that the repeal of the OBPA on April 26, 1996, nearly a month after the Court of Federal Claims' decision, could in

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exploration plans because it is clear defendant cannot and will not perform its end of the bargain as required by the OCSLA." Pet. App. 73a. Had Mobil simply filed suit without filing a POE or seeking permits from EPA under the CWA, the CZMA would never have come into play in this case.

[12] Judgment was similarly entered on behalf of Marathon. J.A. 340. At the time of the decision on liability, Mobil and Marathon were joined by their co-lessee Amerada-Hess and four other lessees. Ultimately, those companies dismissed their claims, while retaining their North Carolina OCS leases, pursuant to judgments that totalled $80.9 million, representing 50% of the bonuses and rentals that they paid for those leases. Fed. Cir. App. 965-66, 969-70.

any way relieve it from liability for the material breach declared by that court.[13]

On October 15, 1998, a majority of the Federal Circuit panel (Judges Plager and Schall, with Judge Newman dissenting) reversed the Court of Federal Claims' judgment. The panel majority expressly "agree[d]" with that court's "find[ing]" that the OBPA was inconsistent with Mobil's lease agreement. Pet. App. 31a. However, the court of appeals did not "dwell upon" the breach issue because it concluded that "the outcome of the case d[id] not turn on this issue." Pet. App. 31a.

Instead, the court of appeals rested its reversal exclusively upon the impact of the CZMA on Mobil's POE. Mistakenly characterizing Mobil's suit as seeking to recover "damages" for the "delay" in approving its POE precipitated by the OBPA, the panel majority held that the North Carolina's CZMA consistency objection was an independent "cause" of the delay and cited five cases holding that claims for "delay damages" should be rejected where there is an independent cause of delay not attributable to the acts of the defendant. Pet. App. 33a-34a. To further support its denial of "delay damages," the panel majority construed the OCS leases as placing an obligation upon Mobil to achieve CZMA consistency and as giving the Government the right to cancel such leases in the event that consistency is not achieved. Pet. App. 31a-32a, 37a. Finally, the panel majority relied upon a

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13 *See* 141 Cong. Rec. 26,033 (Sept. 21, 1995) ("The repeal [of the OBPA] is not intended to excuse the United States from the liabilities, if any, it has incurred to date nor to otherwise affect pending litigation."); *cf.* 1 U.S.C. § 109 ("The repeal of any statute shall not have the effect to release or extinguish any ... liability under such statute, unless the Repealing Act shall so expressly provide.").

provision of the OCSLA, 43 U.S.C. § 1351(h)(2), which denies compensation under that Act if a CZMA consistency objection bars approval of a POD for development and production, as opposed to exploration. Pet. App. 36a-37a.[14]

Mobil sought panel rehearing and suggested rehearing in banc. The petition pointed out that the court had erred in characterizing Mobil's suit for restitution as one for "delay damages." Mobil also argued that the court had misconstrued the relevant provisions of the OCS leases with respect to Mobil's purported obligation to achieve CZMA consistency, as well as the OCSLA with respect to the award of compensation where a CZMA consistency objection bars OCS exploration.[15]

On May 13, 1999, the panel majority (with Judge Rader replacing Judge Schall, who recused himself on rehearing) issued a revised opinion. Although continuing to "agree" with the trial court's finding that the OBPA could not be reconciled with the terms of Mobil's leases, Pet. App. 9a-10a, the court of appeals reaffirmed its decision to reverse. The court excised its erroneous discussion of delay damages and its misconstruction of the OCS leases and the OCSLA, while offering no new rationale for its decision.[16] Stripped of

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14 Judge Newman's dissent followed the lines of one of the arguments advanced by Mobil in its brief: that a CZMA consistency objection would not preclude the restitution sought by the companies since, at most, it raised an issue of impossibility of performance which under settled law would require restitution of their bonuses. Pet. App. 38a-39a.

15 As to the latter, Mobil showed that a CZMA consistency objection at the exploration stage is governed by OCSLA § 1340(c), which, unlike § 1351(h)(2), is silent regarding statutory compensation.

16 Judge Newman reiterated her dissent, albeit in more expansive terms. Pet. App. 17a-21a.

the underpinnings provided in its initial opinion, the panel majority's ultimate decision was expressed as follows:

> Lessees have not established that their inability to obtain secretarial approval of the POE and to undertake exploratory activity *was caused by the moratorium* rather than by the fact that they were unable to provide the necessary state concurrence to their certification of CZMA compliance. * * * The trial court viewed the moratorium imposed by the OBPA as having indefinite duration and unavoidable consequences. In fact, appellees' failure to overcome North Carolina's objections *resulted in a delay that preceded and extended throughout the period in which the OBPA was effective*.

Pet. App. 12a-13a (emphasis added). Accordingly, the rationale for the court of appeals' decision in this case rests upon two related propositions – (1) that Mobil had not established that the OBPA, as opposed to the CZMA, "caused" DOI to withhold approval of the POE and (2) that the OBPA's repeal during the pendency of North Carolina's CZMA objection absolved the Government from liability.

SUMMARY OF ARGUMENT

1. The Court of Federal Claims correctly found that the OBPA constituted an anticipatory repudiation of Mobil's OCS leases giving rise to "total breach." By enacting the OBPA, whose text and legislative history reveal was targeted specifically at Mobil's proposed exploratory well, the Government breached its duty under the leases to approve POEs, PODs, and other permits "pursuant to" and "subject to" the OCSLA. Because the new conditions imposed under the OBPA applied to *every* POE, POD, and drilling permit on

the North Carolina OCS through the life of the leases, the OBPA effected a wholesale restructuring of the bargain struck between the Government and Mobil in 1981.

2. Having expressly "agree[d]" with the Court of Federal Claims that the conditions imposed by the OBPA were inconsistent with the terms of Mobil's lease, the Federal Circuit did not question that restitution is an appropriate remedy for such an anticipatory repudiation. Instead, the Federal Circuit denied Mobil's claim to restitution on the ground that Mobil had not proved that the OBPA was the "cause" of its loss under the contract. The panel majority clearly erred in engrafting onto the law of restitution an unprecedented "causation" requirement.

a. The case law of this and other courts, as well as the black letter law reported by the *Restatement* and contract-law scholars, make plain that a party has an absolute right – without regard to "causation" – to obtain restitution following an anticipatory repudiation like the one here. This is in stark contrast to the role that causation plays in the expectation damages context, where recovery may be had only for losses that would not have occurred "but for" the breach.

b. Corollary rules of contract law further confirm the irrelevance of "causation" to restitution. It is settled that even a plaintiff who could not himself have performed – and thus could not have obtained expectation damages – may nonetheless obtain restitution, even though the plaintiff's own inability to perform would have "caused" its loss. Similarly, a plaintiff may obtain restitution even on what is, from the plaintiff's perspective, a losing contract, for example, where market forces – and not the defendant's breach – "cause" a plaintiff's loss.

c. The Federal Circuit's causation requirement is inconsistent with the policies and purposes of restitution. Unlike expectation damages, which are forward-looking (and thus entail a causation requirement), restitution is backward-looking and seeks to restore both parties to the position they occupied before the contract was made. Given restitution's backward-looking cast, it is irrelevant whether some external factor might later have frustrated Mobil's exploration, development and production plans under its leases.

3. The Federal Circuit's conclusion that the repeal of the OBPA in 1996 – four years after Mobil filed suit – absolves the Government of responsibility for its breach, is plainly wrong. Under settled law, by bringing suit in 1992, Mobil extinguished the Government's right to retract its repudiation.

4. The Federal Circuit's decision, if allowed to stand, would adversely affect government contracting. Not only would the decision undermine the integrity of thousands of existing government contracts involving tens of billions of dollars, it would also chill future government contracting by opening up opportunities for the Government to repudiate its agreements with impunity. The decision would therefore fundamentally undermine what this Court in *Winstar* described as "the Government's own long-run interest as a reliable contracting partner in the myriad workaday transactions of its agencies."

ARGUMENT

The Federal Circuit's rationale in denying Mobil the restitution that it sought based upon the enactment and application of the OBPA is summed up in the last sentence of the introductory paragraph of the court's opinion: "Because the moratorium legislation [the OBPA] was not the *operative cause* of [Mobil's and] Marathon's failure to obtain the

required permits, the judgment of the Court of Federal Claims is reversed." Pet. App. 2a (emphasis added). The court of appeals' reliance upon causation to defeat a claim of restitution is inconsistent with two fundamental contract-law principles that, taken together, control this case. First:

> The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been ... a citizen.

The Sinking-Fund Cases, 99 U.S. (9 Otto) 700, 719 (1879). And second:

> It is an invariably true proposition that whenever one of the parties to a special contract not under seal has, in an unqualified manner, refused to perform his side of the contract, or has disabled himself from performing it by his own act, the other party has thereupon a right to elect to rescind it, and may, on doing so, immediately sue on a quantum meruit for anything he had done under it previously to the rescission.

Ankeny v. Clark, 148 U.S. 345, 353 (1893).

In 1981, the United States Government and Mobil entered into lease contracts whereby Mobil paid the Government more than $78 million for "the exclusive right and privilege to drill for, develop, and produce oil and gas resources" on terms and conditions "pursuant to" and "subject to" the OCSLA. In 1990, in enacting the OBPA, the Government anticipatorily repudiated its obligations under the leases by "impos[ing] severe, burdensome, new

conditions upon DOI's obligation[s] under OCSLA." Pet. App. 71a. Pursuant to *The Sinking-Fund Cases* and *Ankeny* and the common law principles that those cases embrace, Mobil is entitled to restitution of its bonus payment.

I. THE OBPA IMPOSED NEW CONDITIONS INCONSISTENT WITH THE TERMS OF MOBIL'S LEASES AND THEREBY REPUDIATED THOSE LEASES.

The Federal Circuit majority never questioned the Court of Federal Claims' express "find[ing]" that "the OBPA compelled governmental breach by non-performance accompanied by an anticipatory repudiation thereby giving rise to 'total breach.'" Pet. App. 71a. On the contrary, the Federal Circuit "agree[d]" that the new conditions imposed by the OBPA could not be reconciled with the terms of Mobil's leases. Pet. App. 9a-10a. In so concluding, both the Court of Federal Claims and the Federal Circuit followed settled law.

It is a fundamental precept of the common law of contracts that "language that under a fair reading 'amounts to a statement of intention not to perform except on conditions which go beyond the contract' constitutes a repudiation." *Restatement (Second) of Contracts* § 250 cmt. b (1981) (quoting Uniform Commercial Code § 2-610 cmt. 2).[17] This rule has been consistently applied by federal and state courts. *See, e.g., VanHaaren v. State Farm Mut. Auto. Ins. Co.*, 989 F.2d 1, 6 (1st Cir. 1993) ("A contracting party's insistence ... on preconditions to performance not stated in the contract,

[17] Government contracts are controlled by the federal common law of contracts, *see United States v. Allegheny County*, 322 U.S. 174, 183 (1944), which, in turn, is informed by "the principles of general contract law," *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947).

constitutes a breach by anticipatory repudiation."); *Placid Oil Co. v. Humphrey*, 244 F.2d 184, 188 (5th Cir. 1957) (same, where an oil lessor demanded new tests by a lessee); *Millis Constr. Co. v. Fairfield Sapphire Valley, Inc.*, 358 S.E.2d 566, 569-70 (N.C. Ct. App. 1987) ("[I]f a party to the contract states that he cannot perform except on some condition which goes outside the terms of his contract then the statement will constitute a repudiation.").[18]

Mobil's leases were expressly issued "pursuant to" and "subject to" the OCSLA. *See* p. 2, *supra* (quoting OCS Lease § 1). In so incorporating the provisions of the OCSLA, the leases "obligat[ed]" DOI to "timely and fairly consider ... exploration plans properly submitted," Pet. App. 71a, because OCSLA § 1340(c)(1) commands that POEs like Mobil's "shall" be acted upon within 30 days, *see* p. 3, *supra* (quoting OCSLA § 1340(c)(1)). By withholding action on Mobil's POE in light of the new requirements of the OBPA, the Government refused "to perform except on conditions which [went] beyond the contract" and thereby repudiated the lease agreement. *Restatement (Second) of Contracts* § 250 cmt. b; *see also Ankeny*, 148 U.S. at 353 (holding that a party repudiates a contract where he "disable[s] himself from performing it by his own act"). Moreover, because the OBPA applied not only to Mobil's first POE, but also to *every* single POE (of which there could be many) and POD (of which there could be several), as well as to *every* other permit to drill associated with exploration, production, and development of oil or gas on the North Carolina OCS during the life of Mobil's leases, the Government's anticipatory

[18] *Accord, e.g., Unique Sys., Inc. v. Zotos Int'l, Inc.*, 622 F.2d 373, 376-77 (8th Cir. 1980); *Chamberlin v. Puckett Constr.*, 921 P.2d 1237, 1240 (Mont. 1996); *Koski v. Eyles*, 440 A.2d 317, 319 (Conn. Sup. Ct. 1981).

repudiation affected its entire contractual relationship with Mobil.

Finally, the extraordinary nature of the United States' breach in this case is demonstrated by the fact that the OBPA on its face, *see, e.g.*, § 6003(b)(7) (referring to "the Mobil Oil Company" by name), and by its history, *see* pp. 5-7, *supra*, was unquestionably "designed to target" Mobil's lease rights. *See Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569, 1575 (Fed. Cir. 1997), *cert. denied*, 118 S. Ct. 2365 (1998); *see also Sun Oil Co. v. United States*, 572 F.2d 786, 817 (Ct. Cl. 1978) (denial of OCS drilling permits was not a "sovereign act" because it was "directed principally and primarily at plaintiff's contractual right"). By abandoning its argument under the sovereign acts doctrine following this Court's decision in *Winstar*, the Government conceded that the OBPA was not an act of general applicability but was instead, as the Court of Federal Claims found, "narrowly tailored to target" Mobil's leases, Pet. App. 86a, and "specifically enacted to delay indefinitely plaintiffs' exploration of the OCS offshore North Carolina," Pet. App. 91a.[19]

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[19] The Government's only argument contesting the Court of Federal Claims' finding of "material breach" is that the OBPA did not "go[] to the essence of the contract and defeat its object," Op. Cert. 12, because "at all times, petitioners were disabled from proceeding" by the CZMA, *id.* at 13. In this respect, the Government conflates the question of breach of contract and the causation of Mobil's damages associated with the OBPA, just like the Federal Circuit. *See* Pet. App. 16a ("[T]he OBPA was not the cause of [Mobil's and] Marathon's inability to obtain ... approvals for [the] proposed oil exploration, and there is no evidence of a breach of contract by the United States."). The only case cited by the Government in support of its material breach argument, *Sun Oil Co.*, 572 F.2d at 804-06, *see* Op. Cert. 13, involved delay damages, not claims for restitution based on material breach.

II. FOLLOWING THE GOVERNMENT'S ANTICIPATORY REPUDIATION, MOBIL HAD AN ABSOLUTE RIGHT – WITHOUT REGARD TO CAUSATION – TO RESCIND THE CONTRACT AND OBTAIN RESTITUTION OF ITS BONUS PAYMENTS.

The Federal Circuit did not and could not question that restitution is, as a general matter, an appropriate remedy for a material breach by anticipatory repudiation. *See e.g., Stone Forest Indus., Inc. v. United States*, 973 F.2d 1548 (Fed. Cir. 1992) (granting restitution of up-front payments for timber rights following the enactment of a new statute that prevented access to timber lands). Instead, the court of appeals held that Mobil was not entitled to such relief because it had "not established that [its] inability to obtain secretarial approval of the POE and to undertake exploratory activity was *caused* by the [OBPA] moratorium rather than by the fact that [it was] unable to provide the necessary state concurrence to [its] certification of CZMA compliance." Pet. App. 12a (emphasis added).[20] The Federal Circuit's reliance on North Carolina's objection as an independent and

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[20] The Federal Circuit's emphasis on the CZMA as the "cause[]" of Mobil's loss permeates its opinion. *See, e.g.*, Pet. App. 2a, quoted at pp. 18-19, *supra*; Pet. App. 12a ("[T]he OBPA essentially *had no effect* upon these OCS leases because exploration could not proceed without North Carolina's concurrence in the POE's CZMA consistency certification ....") (emphasis added); Pet. App. 13a ("[A]ppellees' failure to overcome North Carolina's objections *resulted* in a delay that preceded and extended throughout the period in which the OBPA was effective.") (emphasis added).

supervening "cause[]" of Mobil's loss confounds clearly established law.[21]

A. Pursuant To Black Letter Law Embraced By This Court, Mobil Had An Absolute Right To Obtain Restitution Following The Government's Anticipatory Repudiation.

The Federal Circuit's focus on causation would have been appropriate if Mobil were seeking "delay damages," as the panel majority mistakenly believed in its initial opinion. Pet. App. 33a-34a.[22] But as Mobil pointed out in its rehearing petition in the Federal Circuit and as the panel majority effectively acknowledged by amending its opinion on rehearing, Mobil was *not* seeking delay damages based upon DOI's failure to act upon its POE as required by OCSLA § 1340(c). Instead, as Judge Newman correctly observed in her dissent below, Mobil "just wants its money back." Pet. App. 17a.

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[21] The court's holding that the CZMA was the actual "cause[]" of Mobil's "inability to obtain secretarial approval of the POE" and that the OBPA therefore "essentially had no effect" on Mobil's lease rights, *see* Pet. App. 11a-12a, also misunderstands the undisputed facts of the case. North Carolina's CZMA objection concerned only Mobil's POE for the first exploratory well offshore North Carolina and was based on matters – *i.e.*, the purported lack of studies for the first drilling activities offshore North Carolina – which were curable and would not have been the basis for North Carolina's objection to later POEs or PODs. J.A. 259-60 (denial of Mobil POE would not preclude the submission of other POEs). The OBPA, by contrast, fundamentally changed the terms and conditions of the leases as to *all* future drilling activities conducted by Mobil.

[22] Delay damages are a form of lost profits or "expectation" damages, seeking recovery for the added costs or lost revenues caused by the delay. 5 John C. McBride & Thomas J. Touhey, *Government Contracts*, § 37A.10 at 37A-1 (1998).

It is axiomatic that "on a repudiation, the injured party is entitled to restitution for any benefit that he has conferred on the other party." *Restatement (Second) of Contracts* § 373; *accord Restatement of Restitution* § 108(a) (1937) ("A person who has conferred a benefit upon another in the performance of a contract or bargain with the other which the other has failed to perform is entitled to restitution … if the other has committed a material breach of contract."); 5 Arthur L. Corbin, *Corbin on Contracts* § 1104, at 560 (1951) ("In the case of a repudiation there is no doubt that the injured party [may obtain] restitution of such value as he may have already conferred upon the repudiator."); II E. Allan Farnsworth, *Farnsworth on Contracts* § 8.20, at 527 n.3 (2d ed. 1998) ("It is … clear that an anticipatory repudiation gives the injured party an immediate claim to restitution.").

This Court has long recognized this fundamental principle. Even before *Ankeny v. Clark*, 148 U.S. at 353, in which a unanimous Court held it to be "an invariably true proposition" that one party's "refus[al] to perform" gives the other party "a right to elect to rescind" and "immediately sue on a quantum meruit for anything he had done under it previously to the rescission," this Court decided *Nash v. Towne*, 72 U.S. (5 Wall.) 689, 701-02 (1867):

> Where the seller of goods received the purchase-money at the agreed price, and subsequently refused to deliver the goods … it was held at a very early period that an action for money had and received would lie to recover back the money, and it has never been heard in a court of justice since that decision that there was any doubt of its correctness.

Other federal courts – including the Federal Circuit, *see Stone Forest Indus., Inc.*, 973 F.2d at 1550 – have likewise affirmed the right of an injured party to respond to a

repudiation by rescinding and obtaining restitution.[23] Indeed, cases like this, in which a party "has paid part or all of the price in advance for a performance that is not forthcoming," are "the clearest case[s] for restitution." III Farnsworth, *supra*, § 12.20, at 325; *see also* Frederic C. Woodward, *The Law of Quasi-Contracts* §262, at 412 (1913) ("[Restitution] has been invoked most frequently in the recovery of money paid.").

Departing from this unbroken line of established authority, the panel majority concluded that North Carolina's CZMA consistency objection was an independent and supervening "cause" of Mobil's loss that extinguished Mobil's right to restitution. The panel's reliance on the concept of causation was misplaced. Of course, a party seeking expectation damages is "limited to damages based on his actual loss *caused* by the breach." *Restatement (Second) of Contracts* § 347 cmt. e (emphasis added). "Recovery can be had only for loss that would not have occurred *but for* the breach." *Id.* (emphasis added). *See generally Hercules, Inc. v. United States*, 24 F.3d 188, 197 (Fed. Cir. 1994) (holding that, in a suit for expectation damages, a breach of contract plaintiff must show that its "damages were caused by the breach"), *aff'd*, 516 U.S. 417 (1996).

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23 *See, e.g., Elyea v. RCA Victor Co.*, 79 F.2d 759, 760 (5th Cir. 1935) (applying federal common law in the pre-*Erie* era); *Bu-Vi-Bar Petroleum Corp. v. Krow*, 40 F.2d 488, 490 (10th Cir. 1930) (same); *United Press Ass'n v. National Newspaper Ass'n*, 237 F. 547, 553 (8th Cir. 1916) (same). *See also Lee v. Foote*, 481 A.2d 484, 485-86 & nn. 3, 6 (D.C. 1984) (collecting state court decisions from numerous jurisdictions and holding that "[w]hen an express contract has been repudiated or materially breached by the defendant, restitution for the value of the non-breaching party's performance is available as an alternative to an action for damages on the contract").

But the question whether, in addition to the OBPA, the CZMA might also have prevented Mobil from ultimately realizing the full benefit of its lease agreement is irrelevant to Mobil's claim for *restitution*. Again, *Ankeny v. Clark*, 148 U.S. at 352 (emphasis added), is dispositive:

> [I]t seems plain that the plaintiff had a right to treat the contract as at an end, and to bring an action to recover the value of the wheat he had delivered to the defendant, and such other damages as he might have suffered by reason of that failure of the latter to perform his part of the contract; *and, a fortiori, that he might waive any demand for consequential damages, and confine his claim to a demand for the value of the wheat.*

Contract law scholars have likewise long affirmed that restitution relief is not concerned with "the damage suffered by the plaintiff *because of* the defendant's breach of contract," and that, in fact, "the damage suffered by the plaintiff is immaterial" to the restitution calculus, "the question being, not what the plaintiff suffered, but what did he give to the defendant in expectation of the performance of the contract by the defendant?" William A. Keener, *Treatise on the Law of Quasi-Contracts* 299 (1893) (emphasis added).

Given these clear statements of the irrelevance of causation to restitution relief, it is not surprising that none of the modern formulations of the rescission-and-restitution rule so much as hints that an aggrieved party must show that the breaching party's repudiation "caused" its loss. To the contrary, all make clear that the innocent party's right to rescind the contract and obtain restitution is absolute. *See, e.g., Restatement (Second) of Contracts* § 373 (stating that upon a repudiation an injured party is "entitled" to restitution of "any" benefit conferred); 5 Corbin, *supra*, § 1104, at 560

(stating that there is "no doubt" that a party may obtain restitution on a repudiation); II Farnsworth, *supra*, § 820, at 527 n.3 (stating that it is "clear" that a repudiation gives the injured party "an immediate claim to restitution").[24]

Nor is it surprising that recent federal cases similarly confirm that causation is irrelevant to claims for rescission and restitution. For example, in *Far West Federal Bank, S.B. v. OTS*, 119 F.3d 1358 (9th Cir. 1997), a group of investors agreed to recapitalize a failing thrift based on certain regulatory forbearances set forth in an agreement with the Federal Home Loan Bank Board. Congress later enacted the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (1989), which mandated regulatory action inconsistent with that agreement. The investors sued, seeking rescission of the agreement and restitution. In urging reversal on appeal of the district court's judgment for the investors, the Government argued that FIRREA had not caused the investors any economic harm because an injunction had "effectively shielded" them from "whatever adverse impact [they] might otherwise have suffered from FIRREA." *Far West*, 119 F.3d at 1365. The Ninth Circuit affirmed the district court, declaring that the Government's argument that FIRREA had not actually caused Far West's losses "misses the point." *Id.*

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[24] *Compare, e.g.*, III Farnsworth, *supra*, § 12.1, at 148-51 (discussing the "difficult problems of causation" posed by the expectation remedy), 3 Dan B. Dobbs, *Dobbs' Law of Remedies* § 12.4(2), at 65-69 (2d ed. 1993) (same), *and* 5 Corbin, *supra*, §§ 992, 997-1028, at 5-7, 19-175 (same), *with, e.g.*, III Farnsworth, *supra*, § 12.1, at 152-53 (discussing restitution relief without mentioning causation), *and* 3 Dobbs, *supra*, § 12.7(1), at 159-63 (same), and 5 Corbin, *supra*, § 996, 1102-1121, at 15-19, 548-652 (same).

> At the moment OTS announced its intention to impose FIRREA regulations on Far West, the Government repudiated the Conversion Agreement. Following repudiation, the Investors had the *absolute right* to cease their own performance and to obtain rescission and restitution.

Id. (emphasis added). Continuing, the Ninth Circuit reiterated that an injured party seeking restitution simply is not required to demonstrate that the breaching party's repudiation actually caused its losses: "FDIC's argument implies that the Investors would have to prove that they suffered consequential damages (*e.g.*, loss of their investment) in order to sue for breach. There is simply no basis in contract law for this proposition." *Id.*

B. Corollary Principles Of Contract Law Confirm That Causation Is Irrelevant To Claims For Rescission And Restitution.

In contract law, principles of causation are "often expressed in corollary rules rather than directly." 3 Dobbs, *supra*, § 12.4(2), at 68-69. Two such "corollary rules" further confirm the irrelevance of causation to a claim for restitution.

First, courts have long recognized that the requirement that a breach-of-contract plaintiff suing for traditional expectation damages show that he is "ready, willing, and able" to perform has no application in the restitution context. As one court put it, although in a suit for expectation damages a plaintiff "must tender and prove his own readiness, willingness, and ability to perform," a party seeking restitution need not make such a showing; rather, in an "action to rescind and recover payments made on account of the purchase price *it is enough to show a breach by the*

seller." *Weintraub v. Rungmar Realty Corp.*, 231 N.Y.S.2d 241, 244 (Sup. Ct. 1962) (emphasis added). In other words, a contract "may be rescinded, and purchase money paid in advance ... may be recovered back on the failure of one party to perform, even though the [complaining] party could not have performed." *Bigler v. Morgan*, 77 N.Y. 312, 318-19 (1879); *accord* 4 Corbin, *supra*, § 978, at 928 ("If the plaintiff could not have performed in any case, he will not be given damages for the defendant's failure to perform .... The rule is not quite the same with respect to the right to restitution of money paid or of the value of other benefits under the contract."). Thus, even where the complaining party's own inability to perform would have independently "caused" its losses under a contract, it is not barred from obtaining restitution of monies paid upon the breaching party's repudiation.

Second, where a defendant breaches what is, from the plaintiff's perspective, a losing contract, such that the plaintiff's expectation interest is zero, courts nonetheless allow the plaintiff to obtain restitution. The *Restatement (Second) of Contracts* is illustrative:

> A contracts to sell a tract of land to B for $100,000. After B has made a part payment of $20,000, A wrongfully refuses to transfer title. B can recover the $20,000 in restitution. *The result is the same even if the market price of the land is only $70,000, so that performance would have been disadvantageous to B.*

Restatement (Second) of Contracts § 373 illus. 1 (based on *Nash v. Towne*, 72 U.S. (5 Wall.) 689) (emphasis added); *accord* III Farnsworth, *supra*, § 12.20, at 325-26 ("If the injured party has paid part or all of the price in advance for a performance that is not forthcoming, that party can get

restitution of what has been paid ... even in the face of the contention by the party in breach that, had the performance been rendered, its value ... would have been less than [that] price," citing the "venerable case" of *Bush v. Canfield*, 2 Conn. 485, 488 (1818)).

In the losing-contract situation, there is clearly an independent "cause" of the plaintiff's loss – for example, market forces that have, from the plaintiff's perspective, diminished or destroyed the value of the contract. Nonetheless, courts permit a losing-contract plaintiff to obtain restitution upon a defendant's breach. Indeed, the Federal Circuit's own decision in *Stone Forest*, 973 F.2d at 1553, recognized this principle in awarding restitution of monies paid upon the Government's repudiation of a timber contract, even though the trial court had found that the plaintiff had not sought "traditional breach of contract damages" because "it could prove none," *Stone Forest Indus., Inc. v. United States*, 22 Cl. Ct. 489, 494 & n.7 (1991). *See also Acme Process Equip. Co. v. United States*, 347 F.2d 509, 528 (Ct. Cl. 1965) (holding that a contractor was entitled to restitution notwithstanding the Government's contention that the contractor would have sustained huge losses had the contract been performed), *rev'd on other grounds*, 385 U.S. 138 (1966).

C. The Policies And Purposes Underlying Restitution Confirm That Causation Is Irrelevant To Claims For Rescission And Restitution.

The Federal Circuit's "no harm, no foul" causation approach fundamentally misconceives the nature of restitution. As noted above, causation *is* relevant to a breach of contract claim for traditional "expectation" damages. *See* p. 26, *supra*. Expectation damages are forward-looking; their object is to give the aggrieved party "the benefit of his

bargain," *Restatement (Second) of Contracts* § 347 cmt. a, and to put that party "in as good a position as he would have been in had the contract been performed, that is, had there been no breach," *id.* § 344 cmt. a. Hence, if some factor external to the contract – some independent "cause" – would have prevented the plaintiff from realizing any benefit under the contract, then the plaintiff's expectation interest, irrespective of the defendant's breach, is zero, and no expectation damages are due.

In holding that causation is likewise a prerequisite to a claim for restitution, the Federal Circuit either misapprehended or papered over a fundamental distinction between expectation damages and restitution relief. As Professor Woodward reported in his seminal treatise, one of the animating forces that drove early common law judges to permit breach-of-contract plaintiffs to elect restitution was a desire to *avoid* the difficult issues of causation that attended the expectation measure of damages. Quoting Lord Mansfield's famous proclamation that "I am a great friend of the action for money had and received; it is a very beneficial action, and founded on principles of eternal justice,"[25] Woodward observed that

> the probable reason for permitting an election [of restitution was] a feeling that the plaintiff had at least lost his money and that the return of his money was a simpler adjustment of rights than the assessment of the damages suffered by the plaintiff as a result of the refusal of the defendant to perform his contract.

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25 *Towers v. Barrett*, 99 Eng. Rep. 1014, 1015 (1786).

Woodward, *supra*, § 262, at 411-12. It is as clear today as it was in Mansfield's time that, unlike the expectation measure of damages, restitution does *not* "attempt[] to compensate [the injured party] for consequential harms." 5 Corbin, *supra*, § 1102, at 548; *accord Ankeny*, 148 U.S. at 352 (distinguishing between restitution relief and "consequential harms" that are "suffered by reason of" defendant's breach); *Far West*, 119 F.3d at 1365 (holding that a party seeking restitution need not show "that [he] suffered consequential damages").

Restitution serves the twin purposes of (1) restoring the contracting parties to the position they occupied before the contract was made and (2) preventing "unjust enrichment" by forcing the breaching party to disgorge benefits unlawfully obtained. *See* Corbin, *supra*, § 1107, at 573 ("[I]n enforcing restitution, the purpose is to require the wrongdoer to restore what he has received and thus tend to put the injured party in as good a position as that occupied by him before the contract was made."). Neither of these purposes provides any role for "causation."

1. Restitution does not seek to put the parties in the position they would have been in had the contract been performed, but rather seeks to "place both of the parties in the position they had prior to entering into the transaction." John D. Calamari & Joseph M. Perillo, *The Law of Contracts* § 15.1, at 599 (4th ed. 1998); *see also Ballou v. Billings*, 136 Mass. 307, 309 (1884) (Holmes, J.) ("Rescission ... annihilates the contract, and puts the parties in the same position as if it had never been made."). Thus, the restitution remedy serves to "restor[e] ... the status quo ante as far as is practicable." 12 Samuel Williston, *A Treatise on the Law of Contracts* § 1455, at 20 (3d ed. Walter H.E. Jaeger, ed., 1968) (quoting *Alder v. Drudis*, 182 P.2d 195, 202 (Cal. 1947)); *see also Tull v. United States*, 481 U.S. 412, 424 (1987) (restitution is concerned with "restoring the status quo

and ordering the return of that which rightfully belongs to the purchaser or tenant") (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946)). Put simply, restitution is "chiefly employed for the unwinding of contracts." John P. Dawson, *Unjust Enrichment* 112 (1951). Given restitution's focus on the time of contracting (here, 1981), it is irrelevant whether some impediment that arose after the contract was made might have frustrated Mobil's ability to explore for, develop, and produce oil and gas on its leases.

The Federal Circuit's opinion reveals its basic misunderstanding of this "contract unwinding" function of the restitution remedy. In denying Mobil's claim, the court observed that it found "no principled distinction" between a lessee whose "hopes for large rewards" are frustrated by a CZMA objection and a lessee "whose hopes are drowned by impossible weather, equipment failures, [or] financial setbacks." Pet. App. 15a. The panel majority's logic might have had some force if directed to a claim for expectation damages. (Indeed, the panel majority's reference to Mobil's "hopes for large rewards" reveals its misunderstanding of the nature of Mobil's claim.) But this case is not about Mobil's supposed "hopes for large rewards"; rather, it is about Mobil's right to reimbursement of the sum certain it paid the Government in 1981. And while "impossible weather" might have frustrated Mobil's *expectation* interest, it could not have affected in any way Mobil's $78 million *restitution* interest – its interest in being returned to the status quo ante, *i.e.*, the position it occupied in 1981, prior to the time of contracting.

2. Restitution also seeks "to prevent unjust enrichment of the party in breach." III Farnsworth, *supra*, § 12.19, at 319; *accord Restatement (Second) of Contracts* § 373 cmt. a (noting that the primary purpose of restitution is to "prevent the unjust enrichment of the [breaching] party"). Thus, restitution is not primarily concerned with the *loss* suffered by the *injured* party – it is concerned instead with

the *gain* unlawfully received by the *breaching* party. "[N]o principle in the law of restitution is more clear than this." *Rapaport v. United States Dep't of the Treasury*, 59 F.3d 212, 217 (D.C. Cir. 1995); *see also* Dobbs, *supra*, § 12.7(1), at 160 ("A damages award focuses on the victim's loss and seeks compensation (or partial compensation); the restitution award focuses on the breacher and seeks to prevent his unjust enrichment by forcing restitution of gains he received under the contract."); Keener, *supra*, at 299 ("[T]he damage suffered by the plaintiff is immaterial, the question being, not what has the plaintiff suffered, but what did he give to the defendant in expectation of the performance of the contract by the defendant?").

III. THE FEDERAL CIRCUIT ERRONEOUSLY CONCLUDED THAT THE REPEAL OF THE OBPA CURED THE GOVERNMENT'S BREACH.

As noted above, pp. 10, 16-17, 21, the OBPA introduced new and unanticipated regulatory hurdles not only for Mobil's first POE for the Manteo area, but also for *every* subsequent permit that Mobil would ever need to delineate oil and gas resources and ultimately to produce such resources and transport them to shore. Mobil argued below that North Carolina's CZMA objection pertained only to the first POE for the area and was based upon a purported lack of environmental studies which, once conducted, would clear the path for later exploration, development, and production. Accordingly, even if the CZMA objection were regarded as the cause of the delay inherent in obtaining approval of the first POE, it would not excuse the material breach caused by the OBPA.

The panel majority rejected Mobil's characterization of the OBPA as a "continuing open-ended prohibition of *any* exploration of the North Carolina OCS and *any* development

and production of oil and gas resources in that area," by observing that North Carolina's CZMA objection "resulted in a delay that preceded and extended throughout *the period in which the OBPA was effective*." App. 13a (emphasis added). This vital underpinning of the court of appeals' decision – that, in the light of the CZMA, the OBPA was not the exclusive cause of Mobil's inability to explore its leases – can only be understood as resting upon the premise that the 1996 repeal of the OBPA during the pendency of North Carolina's CZMA objection (but three-and-a-half years after Mobil filed suit) effectively nullified the anticipatory repudiation that arose with the enactment of the OBPA. This holding of the Federal Circuit, like its reliance on causation, defies settled law.[26]

It is, of course, true that "[t]he effect of a statement as constituting a repudiation … is nullified by a retraction of the statement …." *Restatement (Second) of Contracts* § 256. However, a retraction is effective only "if notification … comes to the attention of the injured party before he materially changes his position in reliance on the repudiation or indicates to the other party that he considers the repudiation to be final." *Id.* Dispositive here, "[t]he bringing of a suit by the promisee for the anticipatory breach is one sort of reliance making retraction impossible." 4 Corbin, *supra*, § 980, at 931; *accord* 11 Williston, *supra*, § 1335, at 182-83 ("If … the contract has been totally rescinded, or an action has been brought … such withdrawal is ineffectual.").

Federal and state courts agree that by filing suit an injured party cuts off a breaching party's right to retract its anticipatory repudiation. *See, e.g.*, *United States v. Seacoast*

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[26] It also ignores the legislative history of the OBPA's repeal and 1 U.S.C. § 109. *See* p. 14 n.13, *supra*.

Gas Co., 204 F.2d 709, 711 (5th Cir. 1953) ("All that is required to close the door to repentance is definite action indicating that the anticipatory breach has been accepted as final, and this requisite can be supplied ... by the filing of a suit ...."); *Lake Erie Distribs., Inc. v. Martlet Importing Co.*, 634 N.Y.S.2d 599, 601 (App. Div. 1995) (same).

Mobil brought suit on October 28, 1992, claiming that the OBPA breached its leases. The OBPA was repealed on April 26, 1996. *See* p. 1, *supra*. That action was far too late to "cure" the anticipatory repudiation that occurred when the OBPA was enacted.

IV. THE FEDERAL CIRCUIT'S DECISION IS INCONSISTENT WITH *WINSTAR*.

One of the principal concerns animating this Court's decision in *Winstar* was the need to protect "the Government's own long-run interest as a reliable contracting partner in the myriad workaday transactions of its agencies." *Winstar*, 518 U.S. at 883. That interest is best served, this Court concluded, by "treat[ing the Government] just like a private party in its contractual dealings," *id.* at 887 n.32, and requiring the "[p]unctilious fulfillment of contractual obligations," which is "essential to the maintenance of the credit of public as well as private debtors," *id.* at 884-85 (quoting *Lynch v. United States*, 292 U.S. 571, 580 (1934)) (internal quotation marks omitted). By contrast, as this Court recognized, a rule "expanding the Government's opportunities for contractual abrogation" will have "the certain result of undermining the Government's credibility at the bargaining table and increasing the cost of its engagements." *Id.* at 884.

This case presents the very dangers that this Court warned against in *Winstar*. The Federal Circuit's decision gives the Government a strong incentive to breach

agreements that become either politically unpopular or financially unprofitable because parties contracting with the Government are almost always subject to various forms of regulation. *Cf. Winstar*, 518 U.S. at 886 (rejecting a rule that would "compromise the Government's capacity as a reliable, straightforward contractor whenever the subject matter of a contract might be subject to subsequent regulation, *which is most if not all of the time*") (emphasis added). The decision below frees the Government, at its discretion, to take advantage of its regulated contracting partners by (1) restructuring and even repudiating its agreements, (2) offering as a post hoc rationalization for its action that some "other" statute or regulation (like the CZMA) served as an independent and supervening "cause" of the innocent parties losses, and (3) keeping any up-front payment, however substantial, that those parties might have paid as a precondition to contracting. The Federal Circuit's rule would therefore cast into doubt thousands of existing government contracts involving billions of dollars. *See* Pet. pp. 20-23.

In addition, the Government's ability under the Federal Circuit's unprecedented rule unilaterally to disturb settled property rights would give private parties a distinct disincentive to enter into *future* government contracts. As the Court of Federal Claims found,

> common sense suggests that no sophisticated oil and gas company with many years of experience in drilling for oil in offshore leased tracts would knowingly agree to pay the huge, up-front considerations here involved for such tenuous and unilaterally interruptible drilling rights.

Pet. App. 63a. To paraphrase this Court's decision in *Winstar*, "[i]njecting the opportunity for [causation] litigation into every [restitution] action would ... produce the untoward

result of compromising the Government's practical capacity to make contracts, which we have held to be 'of the essence of sovereignty' itself." *Winstar*, 518 U.S. at 884 (quoting *United States v. Bekins*, 304 U.S. 27, 51-52 (1938)).

CONCLUSION

For the reasons stated above, the judgment of the Federal Circuit should be reversed.

Respectfully submitted,

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STATUTORY ADDENDUM

SEC. 6003. OUTER BANKS PROTECTION.

(a) SHORT TITLE.—This section may be cited as the "Outer Banks Protection Act".

(b) FINDINGS.—The Congress finds that—

(1) the Outer Banks of North Carolina is an area of exceptional environmental fragility and beauty;

(2) the annual economic benefits of commercial and recreational fishing activities to North Carolina, which could be adversely affected by oil or gas development offshore the State's coast, exceeds $1,000,000,000;

(3) the major industry in coastal North Carolina is tourism, which is subject to potentially significant disruption by offshore oil or gas development;

(4) the physical oceanographic characteristics of the area offshore North Carolina between Cape Hatteras and the mouth of the Chesapeake Bay are not well understood, being affected by Gulf Stream western boundary perturbations and accompanying warm filaments, warm and cold core rings which separate from the Gulf Stream, wind stress, outflow from the Chesapeake Bay, Gulf Stream meanders, and intrusions of Virginia coastal waters around and over the Diamond shoals;

(5) diverse and abundant fisheries resources occur in the western boundary area of the Gulf Stream offshore North Carolina, but little is understood of the complex ecological relationships between the life histories of those species and their physical, chemical, and biological environment;

(6) the environmental impact statements prepared for Outer Continental Shelf lease sales numbered 56 (1981) and 78 (1983) contain insufficient and outdated environmental information from which to make decisions on approval of additional oil and gas leasing, exploration, and development activities;

(7) the draft environmental report, dated November 1, 1989, and the preliminary final environmental report dated June 1, 1990, prepared pursuant to a July 14, 1989 memorandum of understanding between the State of North Carolina, the Department of the Interior, and the Mobil Oil Company, have not allayed concerns about the adequacy of the environmental information available to determine whether to proceed with additional offshore leasing, exploration, or development offshore North Carolina; and

(8) the National Research Council report entitled "The Adequacy of Environmental Information for Outer Continental Shelf Oil and Gas Decisions: Florida and California", issued in 1989, concluded that—

(A) information with respect to those States, which have received greater scrutiny than has North Carolina, is inadequate; and

(B) there are serious generic defects in the Minerals Management Service's methods of environmental analysis,

reinforcing concerns about the adequacy of the scientific and technical information which are the basis for a decision to lease additional tracts or approve an exploration plan offshore North Carolina, especially with respect to oceanographic, ecological, and socioeconomic information.

(c) PROHIBITION OF OIL AND GAS LEASING, EXPLORATION, AND DEVELOPMENT.—

(1) PROHIBITION.—The Secretary of the Interior shall not—

(A) conduct a lease sale;

(B) issue any new leases;

(C) approve any exploration plan;

(D) approve any development and production plan;

(E) approve any application for permit to drill; or

(F) permit any drilling,

for oil or gas under the Outer Continental Shelf Lands Act on any lands of the Outer Continental Shelf offshore North Carolina.

(2) BOUNDARIES.—For purposes of paragraph (1), the term "offshore North Carolina" means the area within the lateral seaward boundaries between areas offshore North Carolina and areas offshore—

(A) Virginia as provided in the joint resolution entitled "Joint resolution granting the consent of Congress to an agreement between the States of North Carolina and Virginia establishing their lateral seaward boundary" approved October 27, 1972 (86 Stat. 1298); and

(B) South Carolina as provided in the Act entitled "An Act granting the consent of Congress to the agreement between the States of North Carolina and South Carolina establishing their lateral seaward boundary" approved October 9, 1981 (95 Stat. 988).

(3) DURATION OF PROHIBITION.—

(A) IN GENERAL.—The prohibition under paragraph (1) shall remain in effect until the later of—

(i) October 1, 1991; or

(ii) 45 days of continuous session of the Congress after submission of a written report to the Congress by the Secretary of the Interior, made after consideration of the findings and recommendations of the Environmental Sciences Review Panel under subsection (e)—

(I) certifying that the information available, including information acquired pursuant to subsection (d), is sufficient to enable the Secretary to carry out his responsibilities under the Outer Continental Shelf Lands Act with respect to authorizing the activities described in paragraph (1); and

(II) including a detailed explanation of any differences between such certification and the findings and recommendations of the Environmental Sciences Review Panel under subsection (e), and a detailed justification of each such difference.

(B) CONTINUOUS SESSION OF CONGRESS.—In computing any 45-day period of continuous session of Congress under subparagraph (A)(ii)—

(i) continuity of session is broken only by an adjournment of the Congress sine die; and

(ii) the days on which either House of Congress is not in session because of an adjournment of more than 3 days to a day certain are excluded.

(d) ADDITIONAL ENVIRONMENTAL INFORMATION.—The Secretary of the Interior shall undertake ecological and socioeconomic studies, additional physical oceanographic studies, including actual field work and the correlation of existing data, and other additional environmental studies, to obtain sufficient information about all significant conditions, processes, and environments which influence, or may be influenced by, oil and gas leasing, exploration, and development activities offshore North Carolina to enable the Secretary to carry out his responsibilities under the Outer Continental Shelf Lands Act with respect to authorizing the activities described in subsection (c)(1). During the time that the Environmental Sciences Review Panel established under subsection (e) is in existence, the Secretary of the Interior shall consult with such Panel in carrying out this subsection.

(e) ENVIRONMENTAL SCIENCES REVIEW PANEL.—

(1) ESTABLISHMENT AND MEMBERSHIP.—There shall be established an Environmental Sciences Review Panel, to consist of—

(A) 1 marine scientist selected by the Secretary of the Interior;

(B) 1 marine scientist selected by the Governor of North Carolina; and

(C) 1 person each from the disciplines of physical oceanography, ecology, and social science, to be selected jointly by the Secretary of the Interior and the Governor of North Carolina from a list of individuals nominated by the National Academy of Sciences.

(2) FUNCTIONS.—Not later than 6 months after the date of the enactment of this Act, the Environmental Sciences Review Panel shall—

(A) prepare and submit to the Secretary of the Interior findings and recommendations—

(i) assessing the adequacy of available physical oceanographic, ecological, and socioeconomic information in enabling the Secretary to carry out his responsibilities under the Outer Continental Shelf Lands Act with respect to authorizing the activities described in subsection (c)(1); and

(ii) if such available information is not adequate for such purposes, indicating what additional information is required to enable the Secretary to carry out such responsibilities; and

(B) consult with the Secretary of the Interior as provided in subsection (d).

(3) EXPENSES.—Each member of the Environmental Sciences Review Panel shall be reimbursed for actual travel expenses and shall receive per diem in lieu of subsistence for each day such member is engaged in the business of the Environmental Sciences Review Panel.

(4) TERMINATION.—The Environmental Sciences Review Panel shall be terminated after the

submission of all findings and recommendations required under paragraph (2)(A).

(f) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the Secretary of the Interior to carry out this section not to exceed $500,000 for fiscal year 1991, to remain available until expended.

OUTER CONTINENTAL SHELF LANDS ACT.

43 U.S.C. § 1334. Administration of leasing

(a) Rules and regulations; amendment; cooperation with State agencies; subject matter and scope of regulations

The Secretary shall administer the provisions of this subchapter relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. * * * The regulations prescribed by the Secretary under this subsection shall include, but not be limited to, provisions—

(1) for the suspension or temporary prohibition of any operation or activity, including production, pursuant to any lease or permit (A) at the request of a lessee, in the national interest, to facilitate proper development of a lease or to allow for the construction or negotiation for use of transportation facilities, or (B) if there is a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), or to the marine, coastal, or human environment, and for the extension of any permit or lease affected by suspension or prohibition under clause (A) or (B) by a period equivalent to the period of such suspension or prohibition, except that no permit or lease shall be so extended when such suspension or prohibition is the result of gross negligence or willful violation of such lease or permit, or of regulations issued with respect to such lease or permit;

(2) with respect to cancellation of any lease or permit—

(A) that such cancellation may occur at any time, if the Secretary determines, after a hearing, that—

(i) continued activity pursuant to such lease or permit would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral (in areas leased or not leased), to the national security or defense, or to the marine, coastal, or human environment;

(ii) the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time; and

(iii) the advantages of cancellation outweigh the advantages of continuing such lease or permit in force;

(B) that such cancellation shall not occur unless and until operations under such lease or permit shall have been under suspension, or temporary prohibition, by the Secretary, with due extension of any lease or permit term continuously for a period of five years, or for a lesser period upon request of the lessee;

(C) that such cancellation shall entitle the lessee to receive such compensation as he shows to the Secretary as being equal to the lesser of (i) the fair value of the canceled rights as of the date of cancellation, taking account of both anticipated revenues from the lease and anticipated costs, including costs of compliance with all applicable regulations and operating orders, liability for cleanup costs or

damages, or both, in the case of an oilspill, and all other costs reasonably anticipated on the lease, or (ii) the excess, if any, over the lessee's revenues, from the lease (plus interest thereon from the date of receipt to date of reimbursement) of all consideration paid for the lease and all direct expenditures made by the lessee after the date of issuance of such lease and in connection with exploration or development, or both, pursuant to the lease (plus interest on such consideration and such expenditures from date of payment to date of reimbursement), except that (I) with respect to leases issued before September 18, 1978, such compensation shall be equal to the amount specified in clause (i) of this subparagraph; and (II) in the case of joint leases which are canceled due to the failure of one or more partners to exercise due diligence, the innocent parties shall have the right to seek damages for such loss from the responsible party or parties and the right to acquire the interests of the negligent party or parties and be issued the lease in question ...

* * *

43 U.S.C. § 1337. Grant of leases by Secretary

(b) Terms and provisions of oil and gas leases

An oil and gas lease issued pursuant to this section shall—

* * *

(4) entitle the lessee to explore, develop, and produce the oil and gas contained within the lease

area, conditioned upon due diligence requirements and the approval of the development and production plan required by this subchapter ...

* * *

43 U.S.C. § 1340. Geological and geophysical explorations

(c) Plan approval; State concurrence; plan provisions

(1) Except as otherwise provided in this subchapter, prior to commencing exploration pursuant to any oil and gas lease issued or maintained under this subchapter, the holder thereof shall submit an exploration plan to the Secretary for approval. Such plan may apply to more than one lease held by a lessee in any one region of the outer Continental Shelf, or by a group of lessees acting under a unitization, pooling, or drilling agreement, and shall be approved by the Secretary if he finds that such plan is consistent with the provisions of this subchapter, regulations prescribed under this subchapter, including regulations prescribed by the Secretary pursuant to paragraph (8) of section 1334(a) of this title, and the provisions of such lease. The Secretary shall require such modifications of such plan as are necessary to achieve such consistency. The Secretary shall approve such plan, as submitted or modified, within thirty days of its submission, except that the Secretary shall disapprove such plan if he determines that (A) any proposed activity under such plan would result in any condition described in section 1334(a)(2)(A)(i) of this title, and (B) such proposed activity cannot be modified to avoid such condition. If the Secretary disapproves a plan under

the preceding sentence, he may, subject to section 1334(a)(2)(B) of this title, cancel such lease and the lessee shall be entitled to compensation in accordance with the regulations prescribed under section 1334(a)(2)(C)(i) or (ii) of this title.

(2) The Secretary shall not grant any license or permit for any activity described in detail in an exploration plan and affecting any land use or water use in the coastal zone of a State with a coastal zone management program approved pursuant to section 1455 of Title 16, unless the State concurs or is conclusively presumed to concur with the consistency certification accompanying such plan pursuant to section 1456(c)(3)(B)(i) or (ii) of Title 16, or the Secretary of Commerce makes the finding authorized by section 1456(c)(3)(B)(iii) of Title 16.

* * *

43 U.S.C. § 1346. Environmental studies

(a) Information for assessment and management of impacts on environment; time for study; impacts on marine biota from pollution or large spills

(1) The Secretary shall conduct a study of any area or region included in any oil and gas lease sale or other lease in order to establish information needed for assessment and management of environmental impacts on the human, marine, and coastal environments of the outer Continental Shelf and the coastal areas which may be affected by oil and gas or other mineral development in such area or region.

* * *

(d) Consideration of relevant environmental information in developing regulations, lease conditions and operating orders

The Secretary shall consider available relevant environmental information in making decisions (including those relating to exploration plans, drilling permits, and development and production plans), in developing appropriate regulations and lease conditions, and in issuing operating orders.

* * *

43 U.S.C. § 1351. Oil and gas development and production

(h) Approval, disapproval or modification of plan; reapplication; periodic review

* * *

* * *

(1)(B) if any of the activities described in detail in the plan for which a Federal license or permit is required and which affects any land use or water use in the coastal zone of a State with a coastal zone management program approved pursuant to section 306 of the Coastal Zone Management Act of 1972 (16 U.S.C. 1455) do not receive concurrence by such State with respect to the consistency certification accompanying such plan pursuant to section 307(c)(3)(B)(i) or (ii) of such Act [16 U.S.C.A. S 1456(c)(3)(B)(i) or (ii)] and the Secretary of Commerce does not make the finding authorized by section 307(c)(3)(B)(iii) of such Act [16 U.S.C.A. S 1456(c)(3)(B)(iii)];

* * *

(2)(A) If a plan is disapproved—

* * *

(ii) under subparagraph (B) of paragraph (1) with respect to a lease issued after approval of a coastal zone management program pursuant to the Coastal Zone Management Act of 1972 (16 U.S.C. 1455), the lessee shall not be entitled to compensation because of such disapproval.

* * *

(C) Upon expiration of the five-year period described in subparagraph (B) of this paragraph, or, in the Secretary's discretion, at an earlier time upon request of a lessee, if the Secretary has not approved a plan, the Secretary shall cancel the lease and the lessee shall be entitled to receive compensation in accordance with section 1334(a)(2)(C) of this title. The Secretary may, at any time within the five-year period described in subparagraph (B) of this paragraph, require the lessee to submit a development and production plan for approval, disapproval, or modification. If the lessee fails to submit a required plan expeditiously and in good faith, the Secretary shall find that the lessee has not been duly diligent in pursuing his obligations under the lease, and shall immediately initiate procedures to cancel such lease, without compensation, under the provisions of section 1334(c) of this title.

OPPOSITION

BRIEF

Jan 28 2000

Supreme Court, U.S.
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Nos. 99-244 and 99-253

In the Supreme Court of the United States

MOBIL OIL EXPLORATION AND PRODUCING SOUTHEAST, INC., PETITIONER

v.

UNITED STATES OF AMERICA

MARATHON OIL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, an asserted delay in the processing of a plan of exploration to perform environmental studies required by Congress was a material breach, or a repudiation, of federal offshore oil and gas leases.

2. Whether, in the circumstances of this case, the lessees waived any claim for rescission and restitution by continuing to require performance by the United States under the leases and by requesting and obtaining a rent-free extension of the leases commensurate with the asserted processing delay.

3. Whether, in the circumstances of this case, if a breach occurred that was not waived, the proper remedy is (i) a rent-free extension of the leases commensurate with the asserted processing delay or (ii) cancellation of the leases and restitution to the lessees of the payments made to secure the leases.

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In the Supreme Court of the United States

No. 99-244

MOBIL OIL EXPLORATION AND PRODUCING SOUTHEAST, INC., PETITIONER

v.

UNITED STATES OF AMERICA

No. 99-253

MARATHON OIL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals upon panel rehearing (Pet. App. 3a-24a) is reported at 177 F.3d 1331.[1] The original opinion of the court of appeals that was subsequently withdrawn (Pet. App. 25a-43a) is reported at 158 F.3d 1253. The opinion of the Court of Federal Claims (Pet. App. 45a-99a) is reported at 35 Fed. Cl. 309.

[1] Unless otherwise noted, citations in this brief to "Pet. App." are to the appendices of the petition filed in No. 99-253.

JURISDICTION

The revised opinion and judgment of the court of appeals were entered on May 13, 1999 (Pet. App. 1a-24a). The petition for a writ of certiorari in No. 99-244 was filed on August 10, 1999. The petition for a writ of certiorari in No. 99-253 was filed on August 11, 1999. The petitions were granted on November 15, 1999. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.*, the Coastal Zone Management Act (CZMA), 16 U.S.C. 1451 *et seq.*, and the Outer Banks Protection Act (OBPA), Pub. L. No. 101-380, § 6003, 104 Stat. 555 (repealed 1996), appear at Pet. App. 100a-173a.

STATEMENT

Petitioners seek to recover from the United States the amounts they paid to obtain federal oil and gas leases on the outer continental shelf. The court of appeals correctly held that the facts of this case do not warrant the restitutionary relief that petitioners request. Petitioners failed to show any material breach by the United States of its obligation under the leases, or indeed any breach at all. The gravamen of their complaint is that a now-repealed intervening statute (the Outer Banks Protection Act) interfered with their rights under the leases, but the court of appeals correctly found that the Act resulted in no delay or alteration of any right petitioners otherwise would have enjoyed. Petitioners' claim for rescission is, in any event, foreclosed by their conduct electing to require further performance by the United States under the leases at substantial additional public expense.

I. Introduction And Statutory Background

1. This case involves the proper interaction of legislation that seeks, on the one hand, to preserve and protect the environment while, on the other hand, allowing development of certain natural resources on federal lands. The case arises in the context of federal oil and gas leases obtained by petitioners for submerged lands offshore of North Carolina. The offshore lands that petitioners have sought to develop are located at what is known as "The Point"—the area offshore of the Outer Banks at "the convergence of the Gulf Stream, continental slope, and shelf waters." J.A. 207. It "is an area characterized by unique physical and biological qualities." *Ibid.* "One of the East Coast's most important commercial and recreation fisheries is located in the waters overlying the proposed drill site." *Id.* at 225. This "area serves as an important migratory pathway and feeding habitat" for many fish species, and "an important food source * * * would be exposed to * * * wastes" resulting from drilling activities in this location. *Ibid.* The areas that petitioners have sought to develop are a "highly productive and ecologically unique area essential to the State's coastal zone." *Id.* at 207. The statutory context in which the leases for these areas were issued, and are to be administered, is highly protective of these important environmental interests.

2. The Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.*, was enacted by Congress in 1953. The Outer Continental Shelf (OCS) is the submerged land beneath navigable waters on the Continental Shelf beginning seaward of the coastal waters within the jurisdiction of the individual States. See 43 U.S.C. 1301(a), (b), 1331(a). The States exercise jurisdiction over the waters and submerged lands within three miles of their coasts. See 43 U.S.C. 1311(a), (b), 1312. Pursuant to the OCSLA, the federal government exercises jurisdiction over the OCS and

ownership of the mineral resources found there. Pet. App. 4a; 43 U.S.C. 1332, 1333.

The OCSLA establishes a detailed framework for issuing mineral leases on the OCS by competitive bidding and for the approval of related activities under the leases. The Secretary of the Interior is authorized to administer the Act's provisions relating to the leasing of the OCS. 43 U.S.C. 1334, 1337, 1343-1346. The Secretary is also directed to promulgate rules and regulations to carry out those provisions—including regulations for the prevention of waste and for conservation of the natural resources of the OCS—and the statute specifies that such regulations shall apply to all operations conducted under any OCS lease. 43 U.S.C. 1334, 1337 (1994 & Supp. III 1997). The Act specifies that these regulations "shall include, but not be limited to," provisions—

> (1) *for the suspension or temporary prohibition of any operation or activity, including production, pursuant to any lease* or permit (A) at the request of a lessee, in the national interest, to facilitate proper development of a lease or to allow for the construction or negotiation for use of transportation facilities, or (B) *if there is a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life)*, to property, to any mineral deposits (in areas leased or unleased), *or to the marine, coastal, or human environment*, * * * .

43 U.S.C. 1334(a) (emphasis added). The OCSLA also directs the Secretary to promulgate regulations providing for the extension of OCS leases in the event of their suspension. *Ibid.* The regulations promulgated by the Secretary under this statute provide that the leases granted under the Act may be suspended (and thereby extended without rent) in order (i) to conduct an environmental analysis; (ii) to comply

with the National Environmental Policy Act; (iii) to avoid threats of serious harm or damage to life, property or the environment; or (iv) to compensate for inordinate delays encountered by lessees in obtaining required permits or consents for lease operations. 30 C.F.R. 250.110(b) (formerly codified at 30 C.F.R. 250.10(b) (1997)).

The Secretary is required to conduct environmental analyses to ensure that serious harm or damage to the environment will not occur and is to offer OCS leases through a competitive bidding process. 43 U.S.C. 1337(a), 1346(a) (1994 & Supp. III 1997). An OCS lease does not grant the lessee an unfettered right to explore and develop the leased area. Instead, the lessee obtains a priority over others in submitting for federal approval plans for exploration, production, or development. *Secretary of the Interior* v. *California*, 464 U.S. 312, 317, 337 (1984); *Tribal Village of Akutan* v. *Hodel*, 869 F.2d 1185, 1187 (9th Cir. 1988), cert. denied, 493 U.S. 873 (1989). Before the lessee may actually explore and develop the leased area, numerous conditions must be satisfied under the leases. In particular, the lessee must obtain mandatory state and federal approvals before any exploration activities may proceed. Pet. App. 5a-6a. The purchase of the lease rights and the payment of the lease rentals does not guarantee the lessee that any of the state or federal approvals required before exploration can occur will in fact be granted. As this Court explained in *Secretary of the Interior* v. *California*, 464 U.S. at 339:

> Under the plain language of OCSLA, the purchase of a lease entails no right to proceed with full exploration, development, or production * * * ; the lessee acquires only a priority in submitting plans to conduct those activities. If these plans, when ultimately submitted, are disapproved, no further exploration or development is permitted.

3. Among the numerous requirements that must be met by a lessee before exploration and development may occur, the following are involved in this case:

a. The lessee must submit a plan of exploration for approval by the Secretary. 43 U.S.C. 1340(b), (c)(1). The Secretary may approve the exploration plan only if it is consistent with the OCSLA, with the regulations prescribed pursuant to OCSLA, and with the provisions of the lease. 43 U.S.C. 1340(c)(1). As part of the approval process, the Secretary must evaluate the environmental impacts of the activities described in the plan of exploration. 30 C.F.R. 250.203(g) (formerly codified at 30 C.F.R. 250.33(g) (1997)). In making that evaluation, the Secretary is to consider the written comments of the Governor of any affected State. 30 C.F.R. 250.203(h) (formerly codified at 30 C.F.R. 250.33(h) (1997)). If an acceptable plan of exploration is submitted to the Secretary, it is to be approved within 30 days of submittal. 43 U.S.C. 1340(c)(1). The power that the Secretary has under 43 U.S.C. 1334(a) to suspend leases while evaluating potential environmental harms (see page 4, *supra*), however, also authorizes him to suspend the 30-day approval process for exploration plans for this same purpose. H.R. Rep. No. 590, 95th Cong., 2d Sess. 49 (1978). The Secretary is directed by the OCSLA to disapprove any plan of exploration that would likely cause any condition described in 43 U.S.C. 1334(a)(2)(A)(i)—such as harm or damage to life (including fish and other aquatic life), to property, to any mineral, to the national security or defense, or to the marine, coastal, or human environment—if the plan cannot be modified to avoid that condition. 43 U.S.C. 1340(c)(1).

b. If the plan of exploration would affect the land, water use, or the natural resources of the coastal zone of any State, the plan may not be implemented unless the further requirements of the Coastal Zone Management Act (CZMA), 16 U.S.C. 1451, *et seq.*, have been satisfied. Under the CZMA,

each State may adopt a Coastal Zone Management Plan for the protection and management of its coastal areas. The Secretary is not to "grant any license or permit for any activity described in detail in the exploration plan" until the lessee has complied with the state-approval procedure established in the CZMA. 16 U.S.C. 1456(c)(3)(B); 43 U.S.C. 1340(c)(2). Under that procedure, the lessee makes an initial certification that its plan of exploration is in compliance with the State's Coastal Zone Management Plan. If the State objects to the lessee's certification, the lessee may appeal the State's objection to the Secretary of Commerce. The Secretary of Commerce may override the State's objection only upon a finding that the plan is consistent with the objectives of the Coastal Zone Management Act or is necessary in the interest of national security. 16 U.S.C. 1456(c)(3)(B)(i)-(ii); 43 U.S.C. 1340(c)(2). If the State has objected to the certification, and if the Secretary of Commerce does *not* override the State's objection, then *no* operations may be conducted under the plan of exploration. 43 U.S.C. 1340(c)(2). In that situation, the lessee must either satisfy the State's objections or submit an alternative exploration plan. 16 U.S.C. 1456(c)(3)(B). See J.A. 253-256, 329-332.

c. If the lessee's plan of exploration contemplates the discharge of any pollutants into the ocean, the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, also requires the lessee to obtain a National Pollutant Discharge Elimination System (NPDES) permit from the Environmental Protection Agency. 33 U.S.C. 1311(a), 1342(a). An NPDES permit cannot be obtained unless the lessee has first complied with the state-approval requirement of the CZMA. The lessee must thus certify that the discharge would be in compliance with the Coastal Zone Management Plan of the affected State. If the State objects to that certification, the Secretary of Commerce may override the State's objection only upon a finding that the drilling plan would be consistent

with the objectives of the CZMA or is necessary in the interest of national security. 16 U.S.C. 1456(c)(3). If the Secretary of Commerce does not override the State's objection, a discharge permit may *not* be issued by the EPA. *Ibid.*

d. A lessee must obtain a permit to drill before commencing any exploratory well under an approved plan of exploration. 43 U.S.C. 1340(d); 30 C.F.R. 250.414 (formerly codified at 30 C.F.R. 250.64 (1997)). If such an exploratory well is authorized and proves successful, the lessee must then obtain approval of a development and production plan before pursuing further activity. 43 U.S.C. 1351. Drilling permits and development and production plans may be approved only if the state-approval requirements of the CZMA have been satisfied. See 43 U.S.C. 1340(c)(2), 1351(d).

e. These restrictions on operations are expressly set forth in the lease terms and in the governing statutes and regulations. Oil and gas exploration companies such as petitioners, who are "knowledgeable and sophisticated purchasers," enter into such leases fully aware of the limitations they impose on potential operations. Pet. App. 13a.

II. *Petitioners' Leases*

4. Between 1981 and 1983, petitioners bid on and obtained ten-year federal oil and gas leases offshore of the Outer Banks area of North Carolina. C.A. App. 180-183. Each of the leases was issued on a standard form. Under that lease form, the parties' rights were subject to all of the provisions and terms of the OCSLA and its regulations, to "all other applicable statutes and regulations," and to other regulations issued in the future that provide for the prevention of waste and the conservation of the natural resources of the OCS. Pet. App. 175a. The leases specify that they may be suspended or canceled by the United States under the terms set forth in the OCSLA. *Id.* at 180a.

5. During the 1980's, petitioners joined with the owners of adjacent OCS leases to form a single exploration unit known as the Manteo Unit. Pet. App. 7a. That unit contained four of the five leases involved in this case. C.A. App. 180-183, 251. Petitioner Mobil Oil Exploration and Producing Southeast, Inc. (Mobil) was the operator of the unit. C.A. App. 210.[2]

As unit operator, Mobil met in 1988 with representatives of the Minerals Management Service (MMS) of the Department of the Interior and the State of North Carolina to commence discussions regarding a potential exploratory well on the Manteo Unit. At that meeting, the Governor of North Carolina expressed the State's "grave concerns about the impacts development of any hydrocarbon resources [in that area of the Outer Banks] would have on the State's valuable estuarine system and other important coastal resources." J.A. 61. The Governor emphasized that (*id.* at 61-62):

> the earlier environmental impact statements (EIS), completed before and after the leases were issued are unsound for some topics. The level of scientific information for these ocean areas has increased dramatically since 1981. It shows unquestionably that the prior analyses were based on flawed data and assumptions. Direct and indirect onshore impacts from a discovery the size Mobil is projecting were never sufficiently analyzed.

In particular, the State expressed the concern that new information regarding fisheries, oil spill trajectories, and ocean currents and conditions was needed to ensure that petitioners' plan of exploration would comply with the

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[2] The operating agreement specified that unit operations would "be suspended while compliance is prevented * * * by governmental rules, regulations, or orders * * * provided, however, that performance shall be resumed within a reasonable time after such cause has been removed * * *." C.A. App. 236.

State's Coastal Management Plan and other applicable environmental requirements. *Ibid.*; see *id.* at 61-75.

6. Knowing that the State's objection was a potential bar to operations under these leases, Mobil entered into lengthy negotiations with the State and the MMS which resulted in a Memorandum of Understanding (MOU) dated July 12, 1989. Under the MOU, Mobil agreed to submit a draft plan of exploration for review by the State and MMS undertook to complete an Environmental Report (ER) on the exploratory well proposed by Mobil. J.A. 79. Mobil also requested and obtained a temporary "suspension" of its leases (J.A. 83) which "put the leases on hold, extended their terms, and suspended [lease] rental payment obligations." C.A. App. 128.3. The MOU further provided that "*[i]f the State objects to Mobil's certification of consistency [under the Coastal Zone Management Act], or if any other administrative or judical challenges or appeals arise*, or if the issuance of the permits for Mobil's exploration activities is delayed due to any of the other circumstances contemplated by 30 C.F.R. § 250.10," the MMS would "*issue additional suspensions of operations*, pursuant to 30 C.F.R. § 250.10, *to allow for the resolution of such matters* and to allow Mobil two drilling seasons under the [exploration plan] thereafter." J.A. 83 (emphasis added).

7. Pursuant to the MOU, Mobil submitted a draft plan of exploration for one exploratory well on the Manteo Unit on September 1, 1989. C.A. App. 268. MMS subsequently issued the draft ER required by the MOU. The State of North Carolina was unsatisfied with the draft exploration plan and the draft ER, however, because it believed that many unique facts regarding the oceanographic and coastal conditions of the Outer Banks area had not properly been taken into account. J.A. 86-95.

8. The draft plan of exploration for the Manteo Unit contemplated the discharge of wastes into the ocean. Mobil

was therefore also required to obtain an NPDES permit from EPA to pursue its plan. 33 U.S.C. 1311(a), 1342(a) (1994 & Supp. III 1997). As with respect to the permits required from the Secretary of the Interior before exploration may occur, an NPDES permit could not be issued by the EPA until Mobil obtained either the concurrence of the State of North Carolina to Mobil's CZMA compliance certification or an override by the Secretary of Commerce of any objection raised by the State. 16 U.S.C. 1456(c)(3).

When Mobil certified that its NPDES permit application complied with the North Carolina Coastal Management Plan on April 17, 1990 (J.A. 96-97), North Carolina made a timely formal objection to that certification on July 16, 1990. *Id.* at 106-112. The State's objection explained that Mobil had presented insufficient information to address and resolve the significant environmental concerns created by the proposed exploration plan. *Ibid.* The State complained that Mobil failed to provide "adequate site specific baseline data" and "has not fully documented assumptions used" in its models. *Id.* at 109. As the result, "the applicability of the models * * * cannot be judged." *Ibid.* The State concluded that "the only alternative is for Mobil to provide the required information," and that, after that information is provided, "the State will then be in a position to review the proposed activity to determine whether it may be conducted in a manner consistent with the North Carolina Coastal Management Program." *Id.* at 110.

Because of the State's objection, Mobil was not eligible to receive an NPDES permit for the proposed Manteo Unit exploration plan. 16 U.S.C. 1456(c)(3). Instead of providing the data and other information requested by the State, however, in July 1990 Mobil invoked the adversary procedures of the CZMA by seeking review of the State's objection before the Secretary of Commerce. J.A. 168. The commencement of that proceeding made petitioners' leases

eligible for suspension under the provisions of the MOU. See pages 9-10, *supra*.

III. *Enactment And Repeal Of The OBPA*

9. On August 18, 1990, the Outer Banks Protection Act (OBPA), was enacted as part of the Oil Pollution Act of 1990. Pub. L. No. 101-380, § 6003, 104 Stat. 555 (repealed 1996). The OBPA was enacted out of a concern of Congress that, in reviewing OCS activities affecting the Outer Banks region of North Carolina, the Department of the Interior needed to ensure that it was giving proper attention to the national environmental policies established under prior legislation such as NEPA and the CZMA. Congress noted that the Outer Banks of North Carolina was an area of exceptional environmental fragility, and that oil and gas development could adversely affect a fishing industry valued at more than $1 billion annually, as well as a major industry of the area, tourism. Congress noted its concern that there may be insufficient knowledge of the physical and oceanographic characteristics of the area and of the fish species that exist there. OBPA § 6003(b)(1)-(5), 104 Stat. 555. In particular, Congress expressed concern that the EIS prepared for the North Carolina lease sales before 1981 appeared insufficient and outdated and thereby failed to accomplish the objectives of federal environmental legislation. Congress found that more recent environmental inquiries had failed to allay concerns about the adequacy of information available to make decisions about leasing, exploration, and development offshore of North Carolina. OBPA § 6003(b)(6)-(8), 104 Stat. 555-556.

In light of these concerns about the sufficiency of environmental information for the uniquely fragile Outer Banks, the OBPA (i) required the establishment of an Environmental Sciences Review Panel (ESRP) to review the environmental issues affecting this area and (ii) directed the

Secretary not to make further lease sales or approve further exploration or development and production activities offshore of North Carolina until the later of October 1, 1991, or 45 days of continuous session of Congress after the Secretary submitted a written report to Congress, made after consideration of the findings and recommendations of the ESRP, certifying that available information *is* sufficient to enable the Secretary to carry out his responsibilities under the OCSLA in authorizing the activities listed above. OBPA § 6003(c)(3), 104 Stat. 556. The ESRP established by the OBPA was required to prepare and submit to the Secretary findings and recommendations:

> (i) assessing the adequacy of available physical oceanographic, ecological, and socioeconomic information in enabling the Secretary to carry out his responsibilities under the [OCSLA] with respect to authorizing [leasing, exploration, and development]; and
>
> (ii) if such available information is not adequate for such purposes, indicating what additional information is required to enable the Secretary to carry out such responsibilities * * * .

OBPA § 6003(e)(2)(A), 104 Stat. 557. The ESRP was to terminate its activities after submitting its findings and recommendations to the Secretary. OBPA § 6003(e)(4), 104 Stat. 558.

10. Following enactment of the OBPA on August 18, 1990, the MMS issued suspensions that applied generally to all leases offshore of North Carolina. J.A. 129-138. Under those suspensions, the terms of the affected leases were "extended for a period of time equal to the period the suspension is in effect" and "[n]o payment of rental is required during the period of this directed suspension." J.A. 130. At the time this general suspension was issued, the leases of petitioners

were already eligible for suspension under the specific terms of the MOU because of the State's earlier objection to the CZMA consistency certification for the NPDES permit. See pages 9-10, *supra*.

11. Following enactment of the OBPA, petitioners continued to treat their North Carolina leases as in effect and as binding upon the parties. They continued to exercise various rights under the leases and continued to seek and demand performance from the United States. In particular, on August 20, 1990, Mobil submitted for approval its final plan of exploration to drill one exploratory well on the Manteo Unit. J.A. 115. Accompanying that plan was a certification by Mobil that the plan of exploration satisfied the North Carolina Coastal Zone Management plan. The State of North Carolina promptly objected to that certification on November 19, 1990. *Id.* at 141-148. That objection conclusively barred the Secretary of the Interior from permitting any implementation of the proposed plan of exploration unless the State's objection was overturned by the Secretary of Commerce. 43 U.S.C. 1340(c)(1). In November 1990, petitioners therefore sought review of the State's CZMA objections before the Secretary of Commerce. J.A. 168.

That proceeding was conducted by the Secretary of Commerce jointly with his review of the State's prior CZMA objections to the NPDES permit application for that same unit. J.A. 168-169, 186-187, 196-336. North Carolina, along with 13 federal agencies and the National Security Council, took part in those administrative proceedings. *Id.* at 211, 277. The OBPA had no effect, and imposed no delay, on this review of the State's CZMA objections by the Secretary of Commerce. *Id.* at 186-187.

12. In January 1992, while petitioners' appeals to the Secretary of Commerce were still pending, the ESRP issued its final report to the Secretary of the Interior. That report

recommended that additional environmental data and studies be obtained before proceeding further with development of the Outer Banks. J.A. 149-164. The Secretary then issued a report to Congress, as required by the OBPA, in April 1992. Pet. App. 198a-204a. In that report, the Secretary addressed the ESRP's recommendations and concluded that he possessed sufficient information to perform his obligations under the OCSLA for review of the pending Manteo Unit plan of exploration. *Id.* at 202a. That certification by the Secretary removed the temporary restraint on approval of the Manteo Unit plan of exploration under the OBPA. The Secretary nonetheless voluntarily deferred further consideration of that plan until he completed two discrete environmental studies recommended by the ESRP. *Ibid.* Throughout this entire period, all activities on the proposed Manteo Unit were in any event barred by the objections of North Carolina to Mobil's CZMA certifications of its plan of exploration and NPDES application. 16 U.S.C. 1456(c)(3)(A)-(B); J.A. 106-112, 141-148.

13. After the Secretary submitted his April 1992 certification to Congress, the MMS sent a letter to the lessees of OCS leases on the Outer Banks that terminated the suspensions imposed on those leases in September 1990. J.A. 165-167. But petitioners then requested the MMS to *reinstate* the lease suspensions, pursuant to the MOU, so that petitioners could continue to pursue their administrative appeals of North Carolina's CZMA objections. J.A. 168-172. Petitioners stated that, while the mandates of the OBPA had "been fulfilled, the Manteo Unit partners are still awaiting a decision from the U.S. Department of Commerce on appeals from the State of North Carolina's Denials of Consistency Certification on the [Manteo Unit] Exploration Plan and the NPDES Permit. These appeals were filed respectively, in July 1990 and December 1990." J.A. 168. Because those proceedings have delayed any operations on

the Manteo Unit "over the past period of years," and because that delay "continues at present," petitioners asked for the lease suspensions to be continued in effect. *Id.* at 169. MMS granted petitioners' request for a further suspension of the leases. *Id.* at 172-174.

14. In July 1994, MMS released the two environmental studies that the Secretary voluntarily performed in connection with his review of the Manteo Unit plan of exploration. J.A. 194. At that time, however, the lease suspensions granted to Mobil pending a decision by the Secretary of Commerce on the State's objections to the plan of exploration and the discharge permit still remained in effect. Pending resolution of those proceedings, and pursuant to the lease suspensions issued at Mobil's request, no further action was taken by the Secretary on the proposed plan of exploration.

15. On September 2, 1994, the Secretary of Commerce issued decisions declining to override the objections of the State of North Carolina to the plan of exploration and the discharge permit that Mobil requested for the Manteo Unit. J.A. 196-336. The Secretary noted that the area in which petitioners sought to drill for oil and gas—"The Point" of the Outer Banks—is "unique" in its "physical and biological qualities." *Id.* at 207. Because of its location at the "convergence of the Gulf Stream, continental slope and shelf waters," there are concentrated masses of "nutrients, plankton and floating materials near the sea surface" that make "The Point [a] highly productive and ecologically unique area essential to the State's coastal zone." *Ibid.* The "anomalously high biomass" of this area makes it an "unusually abundant" environmental resource. *Ibid.* As a result, "the area serves as an important migratory pathway, feeding habitat and spawning ground for several commercially significant species." *Id.* at 225.

With respect to both the proposed discharge permit and the proposed plan of exploration, the Secretary concluded that there was inadequate information "to adequately assess the risk of adverse impacts" on these important environmental resources. J.A. 228, 304.[3] The Secretary found that the environmental hazards from these activities are particularly significant because of the location of the proposed drilling site at "one of the most productive offshore fishing grounds along the east coast." *Id.* at 243. The Secretary noted that available data suggested that the proposed exploration would "have adverse effects on the resources and uses of the State's coastal zone." *Id.* at 245. "Given that this is a frontier area and an area of rich natural resources upon which the State heavily depends," the Secretary concluded that "Mobil has not adequately documented the biological resources or ecological relationships at risk." *Ibid.* The Secretary further concluded that "the ecological relationship of the benthic environment to the State's fisheries must be further assessed in order to adequately evaluate the risks of impact of Mobil's proposed activities." *Id.* at 246.

16. After the Secretary of Commerce declined to override North Carolina's objections under the CZMA, the MMS informed Mobil that the lease suspensions that had been granted pending that decision were terminated. C.A. App. 534. Petitioners, however, promptly filed a suit in federal district court to challenge the determinations made by the Secretary of Commerce. *Mobil Oil Exploration* v. *Brown*, Civ. No. 95-93SSH (D.D.C.). They then requested "reinstatement of the suspensions" in order to complete their suit challenging the decisions upholding the State's

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[3] One of the specific concerns that supported the State's objections was that "Mobil's proposed wastes may either destroy or poison a food source for part of the State's demersal fishery resources." J.A. 231.

CZMA objections to the plan of exploration and the discharge permit. App., *infra*, 2a.

The MMS granted the suspension request, noting that the requested suspensions "are appropriate pursuant to 30 C.F.R. 250.10(b)(6) and the MOU while Mobil seeks judicial review of the Secretary's decision." App., *infra*, 5a. This lease suspension, which was issued at petitioners' request, remains in effect to this day.

17. In 1996, Congress repealed the OBPA. Pub. L. No. 104-134, Title I, Department of the Interior § 109, 110 Stat. 1321-177. Because the Secretary of Commerce declined to override North Carolina's objections to the plan of exploration and the discharge permit, petitioners were barred *both before the OBPA was enacted and after the OBPA was repealed*—as well as while the OBPA was in effect—from any action to implement the proposed Manteo Unit plan of exploration. 43 U.S.C. 1340(c)(2).

IV. *The Present Litigation*

18. In October 1992, more than two years after the OBPA was enacted and during the period that lease suspensions requested by Mobil were in effect, petitioners joined an action filed in the United States Court of Federal Claims in which they claimed that enactment of the OBPA in 1990 effected a material breach and an anticipatory repudiation of their leases.[4] The trial court awarded summary judgment to petitioners (Pet. App. 45a-99a) and entered a final judgment awarding them "restitution of their up-front [lease] payments" in a total amount exceeding $156 million. *Id.* at xa, 44a.

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[4] The action was commenced by Conoco, Inc., in May 1992. J.A. 1. Petitioners are the sole remaining plaintiffs in that action. The complaint included an allegation of a taking of property, which is not before the Court at this time.

19. The court of appeals reversed. Pet. App. 3a-24a. The court concluded that "there is no evidence of a breach of contract by the United States" and that "the lease agreement in this case has not been breached by either party." *Id.* at 18a-19a. "Rather, [petitioners have] been unable to obtain the necessary Government approvals that would allow [them] to go forward with exploration of the lease site, a problem for [petitioners] that arose in 1989, before the OBPA was enacted, and continued after the OBPA was repealed." *Ibid.* The court rejected petitioners' argument that the OBPA was "a supervening act" that made performance impossible. *Id.* at 19a. The court noted that the "OBPA was not the cause of [petitioners'] inability to obtain issuance of the required permits and approvals for its proposed oil exploration." *Ibid.* Although the lessees paid a substantial up-front cash bonus and annual rents in exchange for the "exclusive right and privilege to drill for, develop, and produce oil and gas resources" (*id.* at 13a), that right "was expressly conditioned on compliance with a complex fabric of statutory and regulatory provisions, which included involvement by both federal and state agencies. The lessees were both knowledgeable and sophisticated purchasers, and entered into these leases with their legal eyes wide open." *Ibid.*

The court of appeals further explained that "[w]hatever restraints on secretarial actions were imposed by the OBPA essentially had no effect upon these OCS leases because exploration could not proceed without North Carolina's concurrence in the [plan of exploration's] CZMA consistency certification or the override provided by law." Pet. App. 14a. The court observed that "North Carolina objected from the beginning to the Manteo Unit's proposed exploration as being inconsistent with its coastal zone program under the CZMA * * *; North Carolina maintained [its] * * * objections throughout the time that the moratorium imposed

by the OBPA was effective." *Ibid.* The court concluded that "[u]nder the circumstances of this case, to treat [petitioners'] failure to obtain the necessary approvals and permits for exploratory activity as a breach of contract by the Government would be to eviscerate these salutary protections of the nation's fragile coastal lands and waters." *Id.* at 15a.

The court of appeals also found unconvincing petitioners' contention that, "even if their leases are subject to state objection over the CZMA consistency certification, the OCSLA provides for cancellation of the leases and restitution in such a situation." Pet. App. 16a. The court explained that "[t]he lessee contracted for the exclusive opportunity to explore in a certain area; the inability of a lessee to explore, if not attributable to the Government, does not create an entitlement to any refund of the consideration paid to obtain the lease." *Id.* at 18a.[5]

Judge Newman dissented. Pet. App. 19a-24a. In Judge Newman's view, petitioners had an "entitlement" under their leases to explore the tracts in question that "was negated when the government refused to issue the requisite permits, barring all exploration." *Id.* at 20a. Judge Newman reasoned that the United States breached the leases by refusing "to override North Carolina's objection, although it had that right by statute." *Ibid.*[6]

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[5] Because the court of appeals reversed the trial court's finding of liability, the court did not address the challenges raised by the government to the manner in which the lower court calculated the amount of restitution.

[6] In response to a petition for rehearing, Judge Newman revised her original dissent, in which she had concluded that "the United States did not breach this contract." Pet. App. 43a. In her original dissent, she had reasoned that restitution was nonetheless permissible on the theory that "the contract was voided without the fault of either party" because it had been "made impossible of performance * * * due to the continuing intervention of the State of North Carolina." *Ibid.*

V. *The Pending CZMA Litigation*

20. The suit filed by petitioners to challenge the decision of the Secretary of Commerce declining to override the State's CZMA objections to the Manteo Unit is still pending in federal district court. The court stayed those proceedings after petitioner sought to supplement the administrative record in 1996 to add with studies "submitted more than two years after the comment period closed." 920 F. Supp. 1, 2 (D.D.C. 1996). The court concluded that the Secretary of Commerce should decide whether to reopen the record and that, "[i]f the Secretary decides against reopening the [record], the Court will lift the stay." *Id.* at 3.

The Secretary of Commerce advised the parties on December 8, 1999, that he declined to reopen the record to admit the two new studies. In doing so, the Secretary emphasized that, "even were I to reopen the record to admit the two studies and reconsider my decision, I would still lack sufficient information to override North Carolina's objections." App., *infra*, 8a.[7]

The federal district court proceedings commenced by Mobil are thus still pending, and the lease suspensions requested by Mobil therefore remain fully in effect. See page 17, *supra*.

SUMMARY OF ARGUMENT

I. Petitioners seek rescission and restitution for a purported breach and repudiation of their leases which they assert occurred through the enactment and implementation of the OBPA. There is no dispute among the parties that

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[7] The Secretary of Commerce stated that he "continue[d] to encourage Mobil, North Carolina and other interested parties to work toward resolution of North Carolina's need for additional scientific information about the impacts of Mobil's proposed projects on its coast resources." App., *infra*, 8a-9a.

this case is governed by the general principles of contract law incorporated as federal common law under the decisions of this Court.

The standards for rescission and restitution under the federal common law of contracts are most stringent. A contract claimant may obtain rescission and restitution only by establishing that there has been a material or total breach that defeats the essential object or purpose of the contract. Similarly, only a repudiation of an essential element of the contract can justify rescission and restitution. A failure to perform that is not a material breach of the contract, or that does not defeat an essential object of the agreement, may merit an award of provable damages, but it does not justify rescission and restitution.

Even when a material breach or repudiation of the central object of the contract occurs, rescission and restitution do not automatically follow. The party who seeks such relief must unequivocally manifest his intention to rescind the contract within a reasonable time. If the non-breaching party continues to treat the contract as binding after the purported breach or repudiation, and continues to seek performance from the allegedly breaching party, he may not subsequently claim that the breach was material and may not then obtain restitution. In that situation, the claimant is limited to a recovery of such damages as are proven to result from the partial breach.

II. The standards governing rescission and restitution are not satisfied by petitioners in the circumstances of this case. The OBPA did not effect a material breach or repudiation of the cental object of the lease agreements. Indeed, as the court of appeals correctly held, that Act did not result in *any* breach of contract by the United States (Pet. App. 19a).

The OBPA did not impose any new substantive requirements or conditions upon petitioners. That Act suspended

the Secretary's approval of lease operations offshore of North Carolina for the specific purpose of ensuring that the Secretary was adequately implementing other, preexisting environmental legislation to which such leases are expressly subject. These leases, and the statutes and regulations to which the leases are subject, authorize lease suspensions and administrative delays so that environmental studies may be conducted. Delays of that nature are expressly contemplated and provided for by the parties' agreements and thus do not represent a material breach or repudiation of the leases.

Far from defeating the central object of the leases, the OBPA in fact imposed *no* delay on the parties' performance beyond that already occurring under the express terms of the leases. Petitioners' ability to undertake exploration activities under their leases was at all times—before enactment of the OBPA, while it was in effect, and after its repeal—barred by North Carolina's objections under the CZMA. If the OBPA had never been enacted, petitioners would have thus experienced precisely the same delay in proceeding with their proposed operations.

III. Presumably recognizing that fact, petitioners did not treat their leases as materially breached or repudiated when the OBPA was enacted in 1990. Instead, they did just the opposite. They treated the leases as continuing in effect and repeatedly demanded contract performance by the United States by (i) submitting a proposed plan of exploration, (ii) contesting the objections of the State of North Carolina to the plan of exploration and the associated discharge permit in proceedings conducted before the Secretary of Commerce under the CZMA and (iii) requesting and obtaining suspensions of their lease obligations so that they could conduct those continuing proceedings. Through these actions, petitioners made an affirmative election to continue the contract in effect and thereby waived any claim of rescission based

upon the alleged breach or repudiation of the leases occurring through enactment of the OBPA.

IV. Petitioners have separately requested and received all of the relief to which they may be entitled. Even if a technical breach of the lease agreements occurred, which we dispute, petitioners would be limited to such damages as could be proved from any delay imposed by the OBPA. No such delay occurred, and no such damages exist. Instead, at petitioners' repeated requests, and for reasons unrelated to the OBPA, petitioners' leases were extended for a period of time that began *before* the OBPA was enacted and that continues to this date, long *after* the OBPA has been repealed. Throughout this period, petitioners' leases have been continuously extended, and petitioners have been relieved of any obligation to make lease rental payments. At petitioners' request, these lease suspensions still remain in effect and will not expire until petitioners' challenge to the State of North Carolina's objections to the Manteo Unit exploration plan are finally resolved in other litigation now pending in federal district court. The court of appeals correctly concluded that petitioners' continuing failure to satisfy North Carolina's CZMA objections is "not attributable to" the United States and "does not create an entitlement to any refund of the consideration paid to obtain the lease." Pet. App. 18a.

ARGUMENT

I. GENERAL STANDARDS GOVERNING RESTITUTION APPLY TO THIS CASE

Although the background of this case involves a complex statutory and regulatory scheme governing the offshore leasing of federal lands, resolution of the parties' dispute turns on the application of basic principles of contract law. Petitioners seek rescission and restitution for a purported breach and repudiation of leases that allegedly resulted from

the enactment and implementation of the OBPA. The contractual issues to be resolved in this case are questions of federal common law that are "not controlled by the law of any State." *United States* v. *Allegheny County*, 322 U.S. 174, 183 (1944).

A. Standards For Recovery Of Restitution For Material Breach

It is well established that "[n]ot every departure from the literal terms of a contract is sufficient to be deemed a material breach" that would justify rescission and restitution. *Stone Forest Indus., Inc.* v. *United States*, 973 F.2d 1548, 1550-1551 (Fed. Cir. 1992). Under the federal common law of contracts, a contract claimant may obtain rescission and restitution for breach of contract only by demonstrating a material or total breach that goes to the essence of the contract and defeats its essential object and purpose. *Everett Plywood Corp.* v. *United States*, 512 F.2d 1082, 1093-1094 (Ct. Cl. 1975) (restitution improper when the breach "neither defeated the whole purpose of the contract nor deprived plaintiff of substantially all that it had bargained for"); *Rudd Paint & Varnish Co.* v. *White*, 403 F.2d 289, 291 (10th Cir. 1968) (rescission and restitution appropriate only when a breach is "substantial"); *Neenan* v. *Otis Elevator Co.*, 180 F. 997, 1000-1001 (S.D.N.Y. 1910) (rescission and restitution appropriate only when the breach or default "goes to the substance of the contract"), aff'd, 194 F. 414 (2d Cir. 1912). "Restitution is an available remedy for breach of contract only when the breach is of such vital importance and so material that it is held to go to the 'essence' of the contract." *United States* v. *Western. Cas. & Sur. Co.*, 498 F.2d 335, 339-340 (9th Cir. 1974) (citing 5 *Corbin on Contracts* § 1104, at 562 (1964)). See also John D. Calamari & Joseph M. Perillo, *Contracts* § 15-3, at 649 (3d ed. 1987); 1 George E. Palmer, *The Law of Restitution* § 4.7, at 427 (1978).

Whether, for this purpose, a contract has been materially breached turns on "the nature and effect of the violation in light of how the particular contract was viewed, bargained for, entered into, and performed by the parties." *Stone Forest Indus., Inc.* v. *United States*, 973 F.2d at 1551.[8] Among the factors considered in determining whether a breach is material is an assessment of the "object of the parties in making the agreement" (*Federal Land Bank of Wichita* v. *Krug*, 856 P.2d 111, 115 (Kan. 1993)), "the purpose of the contract" (*Gibbs* v. *G.K.H., Inc.*, 427 S.E.2d 701, 702 (S.C. Ct. App. 1993)), and whether the claimant has been denied the "major benefit" of the exchange (*Thomas* v. *HUD*, 124 F.3d 1439, 1442 (Fed. Cir. 1997)). A material breach is one that defeats both the purpose and object of the contract and that renders performance "substantially different from what was contracted for." *Callanan* v. *Powers*, 92 N.E. 747, 752 (N.Y. 1910). "A breach which goes to only a part of the consideration, is incidental and subordinate to the main purpose of the contract, and may be compensated in damages does not warrant a rescission of the contract." *Eliker* v. *Chief Indus.*, 498 N.W.2d 564, 566-567 (Neb. 1993) (quoting *Klapka* v. *Shrauger*, 281 N.W. 612, 616 (Neb. 1938)).

[8] As Professor Corbin has noted, whether a breach is described as a total or partial breach turns on "a careful weighing of the importance of the facts and events before it, a reasonable interpretation of the expressions of the parties, a consideration of existing doctrines and antecedent cases, and a determination of what public welfare and sound policy require." 4 *Corbin on Contracts*, *supra*, § 946, at 812. "In one sense, there is never such a thing as an immaterial breach. For any breach of contract, an action lies; any breach is material enough for that, although if no substantial injury is shown the damages recoverable are only nominal. But not infrequently the term material breach is used to mean one that the injured party can elect to treat as a total breach." *Id.* at 813. A judgment about whether a breach is "material" for this purpose is thus implicitly a judgment about whether restitution is an appropriate remedy. *Id.* at 812 (the label "stat[es] the result").

The applicable test is whether the breach is so substantial that it "go[es] to the root of the agreement" and defeats the parties' object in making the contract. *Frank Felix Assocs., Ltd.* v. *Austin Drugs, Inc*, 111 F.3d 284, 289 (2d Cir. 1997) (citations omitted).

Even when a material breach occurs, the non-breaching party is not automatically entitled to rescission and restitution, for he must take "affirmative steps" to "manifest his intention to rescind within a reasonable time." *Graham* v. *James*, 144 F.3d 229, 237-238 (2d Cir. 1998). If the non-breaching party continues to treat the contract as binding and continues to demand performance from the other party after a breach occurs, he may not subsequently claim the breach was material and obtain restitution. Instead, the claimant is then limited to such provable damages as occurred from the partial breach. See, *e.g.*, *Cities Serv. Helex, Inc.* v. *United States*, 543 F.2d 1306, 1313 (Ct. Cl. 1976); *Everett Plywood Corp.* v. *United States*, 512 F.2d at 1093.

B. Standards For Recovery Of Restitution For Repudiation

Similar rules apply when the claim of restitution is based on an alleged repudiation of the contract. A refusal to perform an incidental obligation does not warrant rescission of the contract. To justify rescission and restitution, the repudiation must be so material that it defeats the essential object of the parties in making the contract. *City of Fairfax* v. *Washington Metro. Area Transit Auth.*, 582 F.2d 1321, 1327-1331 (4th Cir. 1978), cert. denied, 440 U.S. 914 (1979); *Fredonia Broad. Corp.* v. *RCA Corp.*, 481 F.2d 781, 794 (5th Cir. 1973). The repudiation must be a "'refusal to perform * * * of the whole contract or of a covenant going to the whole consideration.'" *City of Fairfax* v. *Washington Metro. Area Transit Auth.*, 582 F.2d at 1327 (quoting *Kimel*

v. *Missouri State Life Ins. Co.*, 71 F.2d 921, 923 (10th Cir. 1923)). Accord, *Campos* v. *Olson*, 241 F.2d 661, 662-663 (9th Cir. 1957). "[T]he obligation repudiated must be so essential to the purpose of the contract that non-performance makes the agreement worthless." *United Corp.* v. *Reed, Wible and Brown, Inc.*, 626 F. Supp. 1255, 1257 (D. V.I. 1986). To warrant restitution, a repudiation "cannot consist of a mere partial breach; nor can it be based on mere delay unless the contract makes time of the very essence." *City of Fairfax* v. *Washington Metro. Area Trans. Auth.*, 582 F.2d at 1327 (footnotes omitted).

The repudiation must also reflect a "distinct and unequivocal absolute refusal to perform, and must be treated and acted upon as such by the party to whom the promise was made; for if he afterwards continue to urge or demand a compliance with the contract, it is plain that he does not understand it to be at an end." *Smoot's Case*, 82 U.S. (15 Wall.) 36, 48 (1872). See also *Dingley* v. *Oler*, 117 U.S. 490, 503 (1886); *Tretchick* v. *Department of Transp.*, 109 F.3d 749, 752 (Fed. Cir. 1997) (anticipatory repudiation must be an absolute, unqualified communication of refusal to perform); *United States* v. *Dekonty Corp.*, 922 F.2d 826, 827-828 (Fed. Cir. 1991); *Kinsey v. United States*, 852 F.2d 556, 558 (Fed. Cir. 1988).

As with claims for rescission based upon an alleged material breach, a claim for rescission based upon a repudiation of the contract may not be pursued if the claimant did not treat the contract as at an end but instead continued to seek compliance with it. "On the heels of [a] repudiation [the non-repudiating party] had two options: (1) it could have stopped performance and sued for total breach; or (2) it could have affirmed the contract by continuing to perform while suing in partial breach." *ARP Films, Inc.* v. *Marvel Entertainment Group, Inc.*, 952 F.2d 643, 649 (2d Cir. 1991). Actions taken by the non-breaching party to seek or demand

performance by the other party after the purported repudiation are "tantamount to an election to affirm the contract." *Ibid.*, citing, *e.g.*, *Cities Service Helex, Inc.* v. *United States*, 543 F.2d at 1313-1314.

For petitioners to prevail in this case, they therefore must establish that a delay occurring from the operation of the OBPA (i) effected a material breach of the leases that defeated their essential object or (ii) constituted an unequivocal and absolute refusal to perform and a repudiation of the central or "root purpose" of the lease agreements. Even if such a material breach or repudiation were established, petitioners would then also be required to establish that they in fact treated the leases as at an end and did not continue to seek or demand performance under the leases by the United States.

II. THE OBPA DID NOT MATERIALLY BREACH OR REPUDIATE PETITIONERS' LEASES

The court of appeals correctly concluded that petitioners cannot satisfy these prerequisites of restitution. As the court explained, the enactment and implementation of the OBPA did not effect a breach of the leases at all, much less a material breach. Pet. App. 18a-19a.[9] The OBPA did not impose any new *substantive* requirements or conditions upon petitioners or the Secretary. That statute required the Secretary of the Interior to ensure that he was conducting a realistic review of the environmental issues that were framed under the preexisting legislative scheme (NEPA, CZMA, and OCSLA) to which these leases were expressly

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[9] *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996), on which petitioners seek to rely, is fundamentally inapposite because, as the court of appeals correctly held, "there is no evidence of a breach of contract by the United States" in this case. Pet. App. 19a. The Court's decision in *Winstar*, moreover, does not address, and is not inconsistent with, any of the established legal prerequisites of restitution discussed in this brief.

subject. A temporary suspension of lease operations to permit such environmental investigations to be conducted is specifically authorized by the terms of the leases and by the regulations to which the leases are subject. Because a delay of that nature is expressly authorized under the leases, it did not constitute a material breach or repudiation of the leases.

A. *The Enactment And Implementation Of The OBPA Did Not Breach Petitioners' Leases*

1. Prior to enactment of the OBPA, petitioners had tentatively proposed to drill an exploratory well in an area of the Outer Banks that is "[o]ne of the East Coast's most important commercial and recreation fisheries" and is "characterized by unique physical and biological qualities." J.A. 207. The proposal to drill in this "ecologically unique area" (*ibid.*) created especially sensitive environmental concerns for the Outer Banks and for the State of North Carolina—concerns that had not been alleviated by earlier environmental reports prepared by MMS. *Id.* at 61-75.[10]

In enacting the OBPA, Congress found that the oceanographic characteristics of the Outer Banks were complex and not well documented, that little was understood about the unique ecology of that area, and that prior studies had not addressed and resolved the significant environmental questions posed by development in this sensitive offshore zone. OBPA § 6003(b), 104 Stat. 555-556. The Act therefore

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[10] In 1994, the Secretary of Commerce declined to override North Carolina's objection to the drilling proposal under the CZMA and concluded that petitioners had failed adequately to address the environmental harms threatened by their proposed development of the Outer Banks leases. J.A. 245-246; see pages 16-17, *supra*. Instead of providing the data and related information that had been requested by the State, Mobil pursued a course of litigation—challenging the determinations of the State and the Secretary of Commerce in a district court proceeding that is still pending. See pages 20-21, *supra*.

directed the Secretary not to approve further leases or lease operations in the Outer Banks until he was able to certify that he possessed sufficient information to discharge his preexisting environmental responsibilities under the OCSLA. A panel of knowledgeable experts—the ESRP—was created to provide information and recommendations to assist the Secretary in making that certification. See page 12, *supra*. The Secretary was not required to accept any recommendations made by that panel. Instead, after the Secretary certified in 1992 that he possessed sufficient environmental information to discharge his responsibilities under the OCSLA, his authority to approve or disapprove proposed operations under the OCSLA was unaffected by the OBPA. OBPA § 6003(c)-(e), 104 Stat. at 556-558. See pages 14-15, *supra*.

Any temporary delay in the approval of lease operations that could have resulted before the Secretary certified his readiness to perform his OCSLA responsibilities was precisely the type of delay contemplated and authorized by the parties under these leases. By incorporating the provisions of the OCSLA and other applicable statutes and regulations, the leases authorize the suspension of "any operation or activity" when appropriate "*in the national interest*" or "if there is a *threat of serious, irreparable, or immediate harm or damage to* life (including *fish and other aquatic life*), to property, to any mineral deposits (in areas leased or unleased), *or to the marine, coastal, or human environment* * * * ." 43 U.S.C. 1334(a)(1)(A)-(B) (emphasis added). Lease suspensions of this type "merely put the leases on hold, extend[] their terms, and suspend[] rental payment obligations." C.A. App. 128.3.

This contractual authority to suspend lease operations when environmental harm is threatened or when dictated by

the "national interest" applies directly here.[11] The Conference Report on the OBPA notes that any delay resulting from the performance of the required environmental analysis is "related to a legitimate and broad-based public purpose—environmental protection" and to the need "for the collection and analysis of crucial oceanographic, ecological, and socioeconomic data." H.R. Conf. Rep. No. 653, 101st Cong., 2d Sess. 163 (1990). The Conferees concluded that such environmental investigation is "a reasonable action to prevent a public harm that could result from the lack of such information." *Ibid.*

By incorporating the regulations issued under the OCSLA, the leases also authorize suspension when "necessary for the implementation of the requirements of the National Environmental Policy Act or *to conduct an environmental analysis.*" 30 C.F.R. 250.110(b)(4) (emphasis added) (formerly codified at 30 C.F.R. 250.10(b)(4) (1997)). That suspension provision applies precisely to the OBPA, which by its terms directed the Secretary to "conduct an environmental analysis" to ensure that he was properly able to perform his duties under the OCSLA. OBPA § 6003(c)-(e), 104 Stat. at 556-557.

The fact that it was *Congress* that directed the Secretary to perform this environmental analysis—and that the Secretary did not initially undertake this review on his own initiative—does not make the suspension provision inapplicable. This Court has emphasized that it is not a breach of contract for Congress to mandate specific action that was otherwise left to the discretion of the Secretary under a federal lease. *North American Commercial Co.* v.

[11] The 30-day review procedure established for plans of exploration under 43 U.S.C. 1340(c)(1) is similarly subject to deferral whenever the Secretary "believes a suspension of activities on the lease is warranted." H.R. Rep. No. 590, *supra*, at 49.

United States, 171 U.S. 110, 134 (1898). The United States is "the real contracting party," and the Secretary is merely its agent. *Ibid.* Under the applicable statutes and regulations, the United States was entitled to require a suspension of the leases to "conduct an environmental analysis" and thereby determine whether the preexisting environmental requirements applicable to those leases were being met.[12] That is precisely what Congress directed in enacting the OBPA: as the Conferees emphasized, because the leases incorporate the suspension regulations, "the lease terms of all affected OCS tracts will be extended" rent-free during the period that the required environmental determinations are being made and "the interests of the lessees [therefore] will not be adversely affected to achieve the legitimate purposes of this section." H.R. Conf. Rep. No. 653, *supra*, at 163.[13]

[12] In addition, 30 C.F.R. 250.110(b)(6) permits suspension of OCS leases, at the direction of the United States or at the request of the lessee, to allow for inordinate delays encountered by lessees in obtaining required permits or consents. This regulation permits suspension "because of governmental delays beyond the control of the lessee." 47 Fed. Reg. 30,055 (1982).

[13] Petitioners incorrectly imply (Mobil Br. 5-7; Marathon Br. 10-11) that the legislative history of the OBPA demonstrates an intent by Congress to accomplish an open-ended ban on exploration. Petitioners' description of the contents of the "legislative record" is inaccurate. In particular, the cited letters from Congressman Walter Jones and Governor James Martin of North Carolina to President Bush concerning lease operations on the Outer Banks (J.A. 102-105) are not part of the Congressional Record and do not address or explain the scope or purpose of the OBPA. None of the remarks cited by petitioners that actually *are* part of the legislative history of the Act conflict with the clear statement of the Conference Report that the Act merely imposed a "temporary delay in the approval of activities on existing leases offshore North Carolina" for which the leases would be "extended" and which would therefore not "adversely affect" the interests of the lessees. H.R. Conf. Rep. No. 653, *supra*, at 163. As Mobil concedes (Mobil Br. 6), when Congressman Jones

2. The requirement that the Secretary certify to Congress that he possessed sufficient information to comply with his responsibilities under OCSLA before approving further lease operations under that statute (OBPA § 6003(c)(3), 104 Stat. 556) did not alter petitioners' rights under the leases. All operations conducted under OCS leases are subject to compliance with the requirements of OCSLA, NEPA and the CZMA. See pages 5-7, *supra*. If the Secretary did not possess sufficient information to comply with his responsibilities under those statutes, he would not be able to authorize any lease operations. The OBPA did not add any new substantive requirements to those preexisting statutory conditions upon lease operations. See pages 12-13, supra. After completing the required environmental inquiries, the Secretary was authorized to approve exploration and development of OCS leases on the Outer Banks under the same legal criteria that applied prior to enactment of the OBPA. See pages 14-15, *supra*.

In 1992, the Secretary certified to Congress that he possessed sufficient information to carry out his responsibilities under the OCSLA for review of the Manteo Unit exploration plan. Pet. App. 198a.[14] At that time, however, the Secretary

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had previously sought an actual ban on exploration offshore of North Carolina, the House of Representatives rejected the request.

[14] Petitioners incorrectly assign importance to the fact that the Secretary's certification did not expressly address any subsequent or alternative exploration or development activities petitioners might want to perform. See Mobil Br. 8-9, 21, 24 n.21; Marathon Br. 15, 29. It is not surprising that the Secretary's certification specifically addressed only the Manteo Unit plan of exploration, for the Secretary had no other proposals for exploration or development before him. He obviously could not certify that he possessed sufficient information to carry out his responsibilities under the OCSLA regarding *other* activities that petitioners might hypothetically wish to perform at some future time. If other activities were proposed in the future, they could not, under the terms of the leases, be approved unless the Secretary had sufficient information to make the

decided, on his own initiative, to defer approval of the proposed Manteo Unit plan of exploration until two specific environmental studies recommended by the ESRP were completed.[15] Pet. App. 202a. The Secretary's determination to conduct those *additional* "environmental analyses" was authorized by the leases (see page 32, *supra*); it was not a requirement imposed by the OBPA. See note 15, *supra*.[16] The lessees acknowledged that their leases authorized a suspension for the performance of such environmental studies by requesting a renewal of their lease suspensions at that time. J.A. 168-174.

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environmental determinations required under the preexisting applicable statutes. See pages 5-7, *supra*. The OBPA did not alter that fact.

[15] Under the OBPA, the Secretary was not required to adopt any of the environmental study recommendations of the ESRP. See H.R. Conf. Rep. No. 653, *supra*, at 162.

[16] Mobil errs in asserting that the Secretary refused to permit exploration of the Manteo Unit until completion of "all of the studies recommended by the Panel." Mobil Br. 8. In fact, the Secretary stated that he would pursue only two of the studies recommended by the ESRP. Contrary to petitioners' contention (Mobil Br. 8-9; Marathon Br. 15-16), the Secretary did not suggest that any future exploration proposals would be delayed for the performance of additional studies recommended by the ESRP. The Secretary instead stated that environmental information would "be evaluated after the results are available from the first exploratory well" and that the need for additional studies would be addressed as "a part of th[e] environmental assessment process" required under the OCSLA before development operations could commence. Pet. App. 202a. See 43 U.S.C. 1351(e)-(f).

Mobil incorrectly suggests that the ESRP "determined that additional studies would be required before deciding whether to permit *any* of these additional wells." Mobil Br. 9. The ESRP was plainly not empowered to rule upon anything; it merely performed an analysis and issued a report making recommendations. OBPA § 6003(3), 104 Stat. 557. The Secretary was vested with the responsibility and authority under the OCSLA to decide whether to approve any proposed activities, and the OBPA did not change that. 43 U.S.C. 1340(c).

B. *The OBPA Did Not Deprive Petitioners Of The Central Object Of The Leases Or Constitute A Refusal To Perform Them As A Whole*

The OBPA did not defeat the central object of the leases. In fact, that Act imposed no delay on the performance of the parties beyond that already authorized and occurring under the express terms of the leases. Petitioners' ability to undertake exploration activities under these leases was at all times—both before enactment of the OBPA and after its repeal—blocked by North Carolina's objections under the CZMA. See pages 14-15, *supra*. Even if the OBPA had never been enacted, petitioners would thus have experienced precisely the same delay in proceeding with the proposed operations. As the court of appeals stated, petitioners' "failure to overcome North Carolina's objections resulted in a delay that preceded and extended throughout the period in which the OBPA was effective" (Pet. App. 15a).

1. The sole aspect of performance that petitioners claim was impeded during the temporary delay assertedly imposed by the OBPA was the right to have an "approvable" plan of exploration accepted by the Secretary within 30 days of its submission. 43 U.S.C. 1340(c)(1). But petitioners offer no plausible basis for asserting that the 30-day period assigned for this particular administrative step goes to the "essence" of the parties' agreement. It is, in fact, abundantly clear that it does not.

The "essence" of the parties' agreement was for petitioners to obtain a first priority on any right to seek access to offshore minerals for exploration and development. That right "was expressly conditioned on compliance with a complex fabric of statutory and regulatory provisions, which included involvement by both federal and state agencies." Pet. App. 13a. Approval of an exploration plan is only one among many express preconditions to the exploration and

development of an OCS lease. Even when the Secretary has approved an exploration plan, no activities may occur pursuant to the plan when (as in this case) the lessee has not achieved compliance with the Coastal Zone Managment Plan of the affected State. 16 U.S.C. 1456(c)(3)(B); 43 U.S.C. 1340(c)(2). And when, as in this case, the plan of exploration contemplates the discharge of wastes into the ocean, no exploration activities may occur until the lessee obtains an NPDES permit from EPA—a requirement that is independently subject to the CZMA certification process that petitioners have failed to satisfy. 16 U.S.C. 1456(c)(3)(A)-(B); 33 U.S.C. 1311(a), 1342(a). Moreover, even if CZMA compliance were at some point obtained, exploration still could not occur until the lessee obtains a drilling permit—which is an approval procedure for which no specific time limit applies. See 43 U.S.C. 1340(d); 30 C.F.R. 250.414.

The legislative history of the OCSLA confirms that the 30-day approval procedure for exploration plans does not function as the "essence" of these agreements. The Conference Report notes that the Secretary may delay approval of any proposed exploration plan *beyond* the 30-day period whenever "he believes a suspension of activities on the lease is warranted." H.R. Rep. No. 590, *supra*, at 49.[17] The legislative history is thus consistent with the general rule of construction that a statute establishing a time period for

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[17] Since the Secretary deferred action on the exploration plan until required environmental analyses were conducted, for which a suspension of activities was warranted under the applicable regulations, and since the further suspensions requested by petitioners continue in effect even to this day, the period in which the exploration plan is to be approved under 43 U.S.C. 1340(c)(1) has not even yet commenced to run. See pages 15, 17, *supra*. Petitioners are thus not only wrong in stating that a material breach occurred; they are wrong in stating that any breach at all has occurred. Pet. App. 19a.

governmental action is not mandatory in the absence of express language that specifies a consequence for a failure to comply. See *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 62-65 (1993) ("if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction"); *Canadian Fur Trappers Corp.* v. *United States*, 884 F.2d 563, 566 (Fed. Cir. 1989).[18] The "coercive sanction" sought by petitioners in this case—rescission and restitution of the lease for an asserted "noncompliance with statutory timing provisions" (but see note 17, *supra*)—is thus not justified by principles either of contract law or of statutory construction.

In light of the inherently complex and lengthy processes involved in the administration of OCS leases, the asserted failure to obtain compliance with this one, specific 30-day approval period was not "of such vital importance" that it deprived petitioners of "the 'essence' of the contract." *United States* v. *Western Cas. & Sur. Co.*, 498 F.2d at 339. See also *City of Fairfax* v. *Washington Metro. Area Transit Auth.*, 582 F.2d at 1327 (rescission cannot "be based on mere delay" of a performance that the contract has not expressly made "of the very essence"); pages 26-27, *supra*.

2. In concluding that no material breach of contract resulted from enactment of the OBPA, the court of appeals properly took into account the fact that the Secretary "could not have issued any permits for exploration so long as North Carolina's [CZMA] objections remained in force" and that petitioners' "failure to overcome North Carolina's objections resulted in a delay that preceded and extended throughout the period in which the OBPA was effective." Pet. App. 15a.

[18] See also *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 717-719 (1990); *Brock* v. *Pierce County*, 476 U.S. 253 (1986).

Petitioners assert (Mobil Br. 29-30; Marathon Br. 39-42) that this concurrent prohibition of lease operations under the CZMA is irrelevant because an award of restitution is not premised on proof from the non-breaching party that it would have been able to perform its side of the bargain. See *Ankeny* v. *Clark*, 148 U.S. 345, 353 (1893). But the issue in this case is not whether petitioners could, in fact, ultimately achieve performance under the contract:[19] it is whether an asserted *delay* resulting from the OBPA "defeated the whole purpose of the contract" and thereby justifies rescission and restitution. *Everett Plywood Corp.* v. *United States*, 512 F.2d at 1093-1094; see pages 27-29, *supra*. The court of appeals correctly reasoned that the asserted delay resulting from the OBPA was, in fact, inconsequential to the essential rights existing under the leases and that rescission and restitution is therefore not justified. Pet. App. 13a. As the court stated, the asserted delay "had no effect upon these OCS leases"—and therefore was not a material breach—because exploration was concurrently stalled in any event due to petitioners' ongoing failure to achieve compliance with the requirements of the CZMA that were expressly incorporated into the leases. *Id.* at 14a.[20]

III. PETITIONERS WAIVED ANY CLAIM FOR MATERIAL BREACH OR REPUDIATION

Petitioners did not treat these leases as materially breached or repudiated when the OBPA was enacted in

[19] Indeed, since petitoners' leases remain in effect, they may still be able to perform under them. That is, presumably, the reason that petitioners have continued to pursue their litigation challenging the CZMA objections of the State of North Carolina.

[20] One of the five leases at issue in this case (see page 8, *supra*) was not part of the Manteo Unit and has never been encompassed within a proposed plan of exploration. The OBPA obviously did not limit any operations under that lease, since none have ever been proposed.

1990. They did just the opposite. They treated the leases as continuing in effect and repeatedly demanded various different types of contract performance by the United States. In particular, after the asserted breach, petitioners (i) submitted a proposed plan of exploration under the leases, (ii) contested the objections of the State of North Carolina to the plan of exploration and to the associated NPDES discharge permit in proceedings under the CZMA conducted first before the Secretary of Commerce and ultimately in federal district court, and (iii) requested and obtained numerous suspensions of lease operations so that they could pursue their continuing efforts to demand and achieve performance under the leases. See pages 15 and 17, *supra*; note 12, *supra*.

Such actions seeking contractual performance after the asserted material breach has occurred are "tantamount to an election to affirm the contract." *ARP Films, Inc.* v. *Marvel Entertainment Group, Inc.*, 952 F.2d at 649. Even when a material breach or repudiation occurs, there is no automatic right of rescission and restitution. Instead, a material breach gives the non-breaching party the right to elect whether to treat the contract as at an end or to continue it. *Cities Serv. Helex, Inc.* v. *United States*, 543 F.2d at 1313; see pages 30, 32, *supra*. If the non-breaching party decides to treat the contract as at an end, *both* parties are relieved from further performance. If the non-breaching party instead demands further performance under the contract and thereby elects to continue it in effect, *both* parties remain obligated to it.[21] In that situation, the non-breaching

[21] If a party "does what amounts to recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or permits the other party to deal with the subject matter under the belief that the transaction has been recognized, or abstains for a considerable length of time from impeaching it, so that the other is reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, though it be originally impeachable, becomes unimpeachable." *Union Pac. R.R.* v. *United States*, 847 F.2d 1567, 1570 (Fed. Cir. 1988) (quoting *Harvey Radio Labs. Inc.* v. *United States*, 115 F. Supp. 444, 448-449 (Ct. Cl. 1953)).

party has waived the claim for rescission and retains only a claim of damages for partial breach.[22] *Ibid.* See also *Dingley* v. *Oler*, 117 U.S. at 501-504; *Smoot's Case*, 82 U.S. (15 Wall.) at 47-48.

Action taken by the non-breaching party to compel contract performance after a material breach has occurred is the antithesis of the acceptance of a repudiation; it is instead an election to continue performance under the contract. *Cities Serv. Helex, Inc.* v. *United States*, 543 F.2d at 1316; see also *Phillips Petroleum Co.*, 225 Ct. Cl. at 578.[23] Such actions are inconsistent with a claim for rescission because, by not treating the contract as at an end and thereby discharging the breaching party of any further obligation under the contract, they deprive that party of the opportunity to save the expense of additional performance. *Ling-Temco-Vought, Inc.* v. *United States*, 475 F.2d at 638, 639 n.5.

For more than two years after the OBPA was enacted, petitioners did not suggest or announce that the leases would be treated as at an end. Instead, both before and after filing this suit in 1992, they continued to demand and obtain a variety of different types of contract performance from the

[22] See also *Phillips Petroleum Co.* v. *United States*, 225 Ct. Cl. 575, 578-579 (1980); *Pinewood Realty Ltd. Partnership* v. *United States*, 617 F.2d 211, 215 (Ct. Cl. 1980); *Airco, Inc.* v. *United States*, 504 F.2d 1133, 1135-1137 (Ct. Cl. 1974); *Ling-Temco-Vought, Inc.* v. *United States*, 475 F.2d 630, 635-639 (Ct. Cl. 1973).

[23] An exchange of correspondence that requests or offers contract performance has been held to constitute a sufficient election to foreclose a claim of material breach or repudiation. See *Dingley* v. *Oler*, 117 U.S. at 503; *Airco, Inc.* v. *United States*, 504 F.2d at 1135-1137.

United States. For example, in submitting a proposed plan of exploration after the OBPA was enacted, Mobil sought to require the Secretary to take affirmative action under the leases and expend resources in doing so. J.A. 115. Nothing in the submission of that proposed plan of exploration communicated to the United States that petitioners were electing to treat the leases as terminated; instead, petitioners were urging continued performance under the leases. *Ibid.* Having thus continued to "urge or demand a compliance with the contract," petitioners cannot now contend that they instead "underst[oo]d it to be at an end." *Smoot's Case*, 82 U.S. (15 Wall.) at 47-48; *Dingley* v. *Oler*, 117 U.S. at 501-504 (same); see also *Union Pac. R.R.* v. *United States*, 847 F.2d 1567, 1570 (Fed. Cir. 1988).[24]

After the alleged material breach of contract, petitioners also affirmatively treated the leases as in effect by pursuing administrative proceedings before the Secretary of Commerce seeking to overturn North Carolina's objections to the plan of exploration under the CZMA. In doing so, petitioners required the expenditure of resources by the Department of Commerce, the Department of the Interior, and the 12 other federal agencies that took part in the administrative proceedings. J.A. 196, 211, 261, 277. Moreover, even after petitioners commenced the present suit for restitution, they have continued to seek enforcement of their lease rights (i) by pursuing their challenge to the State's CZMA objection into federal district court and (ii) by seeking and obtaining extensions of their leases to permit

[24] If a party continues to insist on performance, and fails to declare a contract terminated, after an essential aspect of performance has not occurred in a timely manner, he may not thereafter contend that time was "of the essence" in the performance of that obligation. *Pinewood Realty Ltd. Partnership* v. *United States*, 617 F.2d at 214; *DeVito* v. *United States*, 413 F.2d 1147, 1153-1154 (Ct. Cl. 1969); *Jackson* v. *United States*, 12 Cl. Ct. 363, 365-366 (1987).

those continuing lease enforcement efforts to proceed. See J.A. 168-171; App., *infra*, 2a.

For a period of several years following the enactment (and repeal) of the OBPA, petitioners' conduct has thus been significantly inconsistent with any election to treat these leases as at an end. Their continued efforts to demand and obtain performance under the leases, which have compelled several agencies of the United States to expend considerable resources in continued administration of these leases, represent an "election" that bars any claim for restitution. Petitioners have "affirmed the contract by continuing to perform;" they may therefore obtain recovery only for such damages as are proven to result from the asserted "partial breach" of contract. *ARP Films, Inc.* v. *Marvel Entertainment Group, Inc.*, 952 F.2d at 649; see also *Sun Oil Co.* v. *United States*, 572 F.2d 786, 801, 817 (Ct. Cl. 1978).

IV. PETITIONERS HAVE RECEIVED ANY RELIEF TO WHICH THEY ARE ENTITLED

Outside the four corners of this litigation, petitioners have requested and been granted all of the relief to which they may be entitled. Even if some technical breach of the lease agreements occurred, which we dispute, petitioners would be limited to the recovery of such damages as were actually caused by delay imposed by the OBPA. See *Sun Oil Co.* v. *United States*, 572 F.2d at 804- 806.[25] Because the continuing objections of North Carolina to the plan of exploration preclude petitioners from proceeding with *any* exploration

[25] The United States is not liable for damages from a delay in performance that is not caused by its actions. *Merritt-Chapman & Scott Corp.* v. *United States*, 528 F.2d 1392, 1397 (Ct. Cl. 1976). Government delays in the approval of OCS lease operations do not support a claim for damages if the lessee's operations would have been delayed for independent reasons. *Sun Oil Co.* v. *United States*, 572 F.2d at 804-806, 817.

or development activities under these leases, petitioners cannot establish that they have suffered any actual injury or damages from the alleged delay in the approval of those plans by the United States.

To the contrary, both before and after enactment of the OBPA, petitioners have requested the Secretary to *suspend* operations under these leases while their challenges to the State's CZMA objections are litigated to conclusion. Both before the OBPA was enacted and after it was repealed, those requests were granted by the Secretary. See pages 9, 15, 17, *supra*. The lease suspensions requested by petitioners thus continue in effect until this day, and they will remain in effect until petitioners' challenge to the State's objections are finally resolved in the separate litigation commenced by petitioners in federal district court. See page 17, *supra*.

Throughout the lengthy period of the lease suspensions that petitioners have requested, the terms of the leases have been continuously extended and petitioners have been relieved of any obligation to make lease rental payments. See page 9, *supra*. Petitioners thus retain the same rights under their leases that they had when the lease suspension first went into effect *before* the OBPA was enacted, in July 1989. As the court of appeals concluded, the "real complaint" of petitioners is that they have been unable throughout this period to satisfy or "override North Carolina's CZMA objections." Pet. App. 16a. Petitioners' continuing failure or inability to provide the data and analysis that would allow them to resolve the State's long-stated environmental objections is "not attributable to" the United States and "does not create an entitlement to any refund of the consideration paid to obtain the lease." *Id.* at 18a.[26]

[26] Because the court of appeals reversed the trial court's conclusion that petitioners were entitled to restitution, it did not address the government's further arguments that the trial court had incorrectly calculated the amount of the award. Accordingly, if this Court reverses the decision of the court of appeals on the issue of liability, the case should be remanded to the court of appeals for further proceedings regarding the proper calculation of the amount of the award.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 2000

APPENDIX

Mobil Exploration & Producing U.S. Inc.

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United States Department of the Interior
Minerals Management Service
1201 Elmwood Park Blvd.
New Orleans, LA 70123-2394

Attention: Mr. Ralph Melancon
Regional Supervisor

February 21, 1995

Dear Mr. Melancon:

On November 9, 1994 and again on December 1, 1994 Mobil received a letter from the MMS terminating the suspension for the following OCS leases effective November 10, 1994:

OCS Lease Numbers

00225 00227 00229 00231 00233 00235 00237 00239 00242 00244 00448 00226 00228 00230 00232 00234 00236 00238 00240 00243 00446

The November 9 MMS letter indicated that the suspensions were being terminated because the two studies recommended by the Environmental Sciences Review Panel were sent to the Commerce Secretary (Secretary) and

because on September 2, 1994 the Secretary had denied Mobil's appeals of North Carolina's denials of consistency. However, the time period to seek judicial review of the Secretary's decisions had not expired when the MMS terminated the suspensions. On January 18, 1994 Mobil filed suit challenging the Secretary's decisions with regard to the Manteo Unit. (*Mobil Exploration & Producing Southeast Inc. v. Ronald H. Brown*, Case No. 1: 95CV00093, United States Court for the District of Columbia). Since the Secretary's decision is being challenged, it is not a final decision and will not be until it is upheld by a final nonappealable judgment issued from a court with competent jurisdiction. Thus, Mobil requests a reinstatement of the suspensions effective November 10, 1994 in order that the terms of subject leases be extended for a period of time equal to the period the suspensions are in effect and to allow Mobil two drilling seasons under the EP thereafter.

Mobil makes this request (1) pursuant to 30 C.F.R. § 250.10(b)(6), which allows the Regional Supervisor to grant suspensions when inordinate delays are encountered by the lessee(s) in obtaining required permits or consents, *including judicial challenges or appeals*; and (2) pursuant to the July 12, 1989 Memorandum of Understanding with the State of North Carolina and the MMS which states:

> If the state objects to Mobil's certificate of consistency, or if any other administrative or *judicial appeals arise*, . . . upon Mobil's application, [the MMS will] issue additional suspensions of operations, pursuant to 30 C.F.R. § 250.10, to allow for the resolution of such matters and to allow Mobil two drilling seasons under the EP thereafter. For the purpose of this paragraph, a drilling season is the period of May through October 31.

Any questions please contact the undersigned.

Very truly yours,

/s/ illegible
Toni D. Hennike

cc: Chris C. Oynes
Regional Director
MMS, Gulf of Mexico OCS Region
1201 Elmwood Park Blvd.
New Orleans, LA 70123-2394

MS 5322

JUN 02 1995

Mobil Exploration & Producing U.S. Inc.
Attention: MS. Toni D. Hennike
Post Office Box 650232
Dallas, Texas 75265-0232

Dear Ms. Hennike:

Pursuant to Minerals Management Service's (MMS) letter dated October 9, 1992, suspensions of operations (SOO) were issued for the 21 leases in the Manteo Unit, Agreement No. 752-290001-0, offshore North Carolina. The letter states that the SOO's will expire when the two studies recommended by the Environmental Sciences Review Panel have been accepted by the MMS and when the U.S. Department of Commerce renders a decision on the appeals from the State of North Carolina's Denial of Consistency Certification on the Exploration Plan and the NPDES Permit.

By letter dated July 22, 1994, the MMS Transmitted the two aforementioned studies to the Department of Commerce, and on September 2, 1994, the Secretary of Commerce issued a decision upholding North Carolina's objection to your proposed Exploration Plan. The MMS letter dated November 9, 1994, provided formal notice that the suspensions for the 21 leases in the Manteo Unit were terminated and that rental payments are to be calculated from November 10, 1994.

Your letter dated Febrary 21, 1995, requests, pursuant to 30 CFR 250.10(b)(6) and the Memorandum of Understanding (MOU) of July 12, 1989, with the State of North Carolina and the MMS, the reinstatement of the SOO's for the Manteo

Unit leases effective November 10, 1994. Our office did not receive the original of this letter; however, a facsimile was received on April 4, 1995.

Mobil filed suit in the U.S. District Court for the District of Columbia (Case No. 1:95V00093) January 18, 1995, challenging the Secretary's decision and stating that the time period to seek judicial review had not expired when the MMS terminated the SOO's.

Although it is our position that the terms of the SOO approval letter dated October 9, 1992, were satisfied, we believe new suspensions are appropriate pursuant to 30 CFR 250.10(b)(6) and the MOU while Mobil seeks judicial review of the Secretary's decision.

Therefore, we hereby approve SOO's for the Manteo Unit leases from November 10, 1994, until a nonappealable final judgment concerning the Secretary of Commerce's decision is issued from a court of competent jurisdiction. However, pursuant to 30 CFR 250.10(e), the SOO's shall not exceed five years.

We request that Mobil immediately notify this office of the decision rendered in its present suit, referenced above, by the delivery of a copy of said decision.

The terms of the Manto Unit leases will be extended for a period of time equal to the period the SOO's are in effect. Rental payments for the 21 leases in the Manteo Unit will be required during the time of the SOO's in accor dance with 30 CFR 218.154(b)(2). The Manteo Unit includes

the following leases:

OCS-A 00225	OCS-A 00236
OCS-A 00226	OCS-A 00237
OCS-A 00227	OCS-A 00238
OCS-A 00228	OCS-A 00239
OCS-A 00229	OCS-A 00240
OCS-A 00230	OCS-A 00242
OCS-A 00231	OCS-A 00243
OCS-A 00232	OCS-A 00244
OCS-A 00233	OCS-A 00446
OCS-A 00234	OCS-A 00448
OCS-A 00235	

If you have any questions, please call Mr. Al Durr at (504) 736-2659.

Sincerely,

(ORIG. SGD.) GARY L. LORE
Chris C. Oynes
Regional Director

[SEAL OMITTED]

THE SECRETARY OF COMMERCE
Washington, D.C. 20230

Dec. 8, 1999

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Re: Appeals of Mobil Oil Exploration and Producing Southeast, Inc. from Objections by the State of North Carolina to its Drilling Discharge Plan and its Plan of Exploration for Monteo Leases

Dear Counsel:

On September 2, 1994, Secretary of Commerce Brown issued a decision declining to override two objections by the State of North Carolina (North Carolina) to the proposed drilling discharges (PDD) and overall Plan of Exploration (POE) by Mobil Oil Exploration & Producing Southeast, Inc. (Mobil) at a site about 38 miles offshore North Carolina. Secretary Brown made the decision pursuant to section 307(c) (3) of the Coastal Zone Management Act (CZMA). Mobil challenged this decision in Federal Court as being arbitrary and capricious in violation of the Administrative Procedure Act (APA). On March 11, 1996, the Court ordered a stay of the litigation and remanded the matter to me for a determination whether the administrative record should be

reopened to receive two studies, one on the impacts of Mobil's proposals on benthic resources and the other on socio-economic resources. *Mobil, et al. v. Brown, et al.*, 920 F. Supp. 1 (D.D.C. 1996).

During this same period, Mobil and Marathon Oil Co. brought an action against the United States for restititution of rents and bonuses paid for the leases underlying the POE and PDD. Mobil argued that the passage of the Outer Banks Protection Act prevented it and Marathon from pursuing their rights under the leases. *Marathon Oil Company v. United States*, 177 F3d 1331 (Fed. Cir. 1999), *petition for cert. filed*, August 11, 1999. In addition, since 1995, several attempts to settle these matters have been initiated and failed.

I decline to reopen the record to admit the two studies at issue in *Mobil v. Brown*. Both this Department and parties to appeals under the CZMA have a strong interest in the finality of my decisions and the administrative process. Moreover, even were I to reopen the record to admit the two studies and reconsider my decision, I would still lack sufficient information to override North Carolina's objection. Thus, I am persuaded that the interest in finality should prevail over any interest the parties may have in supplementing the record. In light of this decision, I continue to encourage Mobil, North Carolina, and other interested parties to work toward resolution of North Carolina's need for additional scientific information about the impacts of Mobil's proposed projects on its coastal uses and resources.

Discussion

On September 2, 1994, Secretary of Commerce Ron Brown declined to override objections by the State of North Carolina (North Carolina) to the Plan of Exploration (POE)

and the Proposal to Discharge Drilling Waste (PDD) associated with the POE submitted by Mobil Oil Exploration & Producing Southeast, Inc. (Mobil). The basis of North Carolina's objections was a lack of necessary information upon which to find the proposals consistent with its coastal management program. North Carolina specifically identified a need for the preparation of a four part fisheries study. In reviewing Mobil's appeals, Secretary Brown was required to determine whether the proposed projects were consistent with the objectives of the CZMA or necessary in the interest of national security. See 15 CFR 930.120, 930.121 and 930.130.

The 1994 decisions were based upon two administrative records that total approximately 10,000 pages of information. In spite of the quantity of material, certain information necessary to the decision was not provided by Mobil; specifically the record lacked information on: (1) the cumulative effects of Mobil's discharges; (2) the ecological effects of Mobil's discharges; (3) the effects on various fisheries of Mobil's discharges; (4) the effects on near-surface animals and planktonic resources of Mobil's discharges; (5) the effects of the discharges on benthic resources; and (6) the socio-economic effects of the POE. These information gaps precluded the conclusion that Mobil's POE and PDD "will not cause adverse effects on the natural resources of the coastal zone substantial enough to outweigh its contribution to the national interest." 50 CFR 930.121(b).[27]

---

[27] See, Decision and Findings in the Drilling Discharge consistency appeal of Mobil Exploration & Producing Southeast, Inc. from an Objection by the State of North Carolina, September 2, 1994, pp. 40-41; Decision and findings in the Plan of Exploration Consistency Appeal of Mobil Exploration & Producing Southeast, Inc. from and Objection by the State of North Carolina, September 2, 1994, p. 33.

The question before me now is whether to reopen the record to admit the two studies and reconsider the prior decisions. I decline to do so.

First, this Department has an interest in the finality of its administrative processes. The regulations of the National Oceanic Atmospheric Administration (NOAA) implementing the CZMA provide for a Secretarial override procedure that includes the filing of technical information, briefs, federal agency comments and, if necessary, a public hearing. See, 15 CFR 930.125, 930.126, 930.127, and 930.129. The regulations provide for extensions of time to be granted, normally in the amount of 15 days. 50 CFR 930.125(c), and 930.126(b). In the case of Mobil's appeals the development of the administrative records was allowed to take eighteen months. The administrative records in both appeals were closed and reopened twice, finally closing May 29, 1992.[28] No request to hold the record open for pending research relevant to my decision was ever submitted by Mobil, North Carolina or any federal agency.

The two studies at issue were completed in March and September of 1993, long after the record closed in May 1992. Yet the studies were still not submitted until July 22, 1994. The studies were submitted by the Minerals Management Service (MMS) without any request to reopen the record or

[28] The administrative record for the PDD was first closed on June 18, 1991. It was reopened at North Carolina's request on April 29, 1992, and remained open for one month as agreed by Mobil and North Carolina, closing for the second time on May 29, 1992, with the submission of Mobil's Supplemental Final Statement. All federal agency comments were received prior to the first closing of the record, including those of the Minerals Management Service dated, December 27, 1990, on the PDD and June 1, 1991, on the POE.

any opportunity for the parties to comment. Subsequently, through its lawsuit, *Mobil v. Brown*, Mobil urged the court to consider the benthic resources and socio-economic impact studies in reviewing Secretarial decisions. Yet, Mobil never requested that I consider the studies during the pendency of its appeals. In fact, in its briefs to me, Mobil stated that the studies "are not even associated with the information issues at issue here."[29]

As provided in the CZMA regulations, consistency decisions are based upon the administrative record developed by the parties and all other interested agencies and members of the public. It is not practical or reasonable to reopen the record now to reconsider prior decisions in light of these two studies. Nor was it reasonable to do so in July 1994, six weeks before the release of the final decisions. Once the administrative record has closed and the decision making process begun, the record should not be reopened unless good cause is shown by the moving party and no prejudice will inure to the other parties. No such request, argument or showing was ever made in these cases. The receipt of these studies two years after the administrative records in these appeals closed, was untimely.

Second, these studies address only two of the six information gaps identified in the 1994 decisions. Were I to reopen the record to consider these studies, and if these studies were sufficient to address the need for analyses and site specific information on benthic resources and socio-economic impacts, there would still remain significant gaps in information necessary for me to override North Carolina's objections. Specifically, for the PDD, I would still lack

[29] See, Mobil's supplemental Final Brief on POE at 11, and Mobil's Supplemental Final Brief on the PDD at 12.

information on: 1) the potential for bioaccumulation of heavy metals and other toxic substances; 2) a worst case analysis that accounts for cumulative impacts and related ecological effects; (3) impacts on near-surface and planktonic resources; and 4) the ecological functions of the Sargassum community. For the POE, I would still lack: 1) site specific information on fishery resources; 2) information on near-surface animals and planktonic resources, particularly as they relate to the Sargassum communities that harbor important resources for fish in their larval state; and 3) site specific studies on potential impacts to the fishery resources.

Without sufficient information to identify the adverse impacts of the proposed projects to the state's coastal resources, I cannot make the finding required by 15 CFR 930.121(b). The two studies at issue cannot, alone, address all the information gaps identified in my September 2, 1994, decisions.

For the foregoing reasons, I decline to reopen the record to include the two new studies and reconsider my decision in this matter.

Sincerely,

/s/ WILLIAM M. DALEY
WILLIAM M. DALEY

cc: The Honorable Stanley S. Harris
United States District Court
for the District of Columbia

Mar 2. 2000

Supreme Court, U.S.
FILED
MAR 01 2000
CLERK

Nos. 99-244 and 99-253

IN THE

Supreme Court of the United States

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,
AND
MARATHON OIL COMPANY

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari To the United States Court of Appeals For the Federal Circuit

REPLY BRIEF FOR PETITIONER MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.

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March 1, 2000

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REPLY BRIEF OF PETITIONER MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.

The Federal Circuit grounded its holding on two propositions: first, that "the [OBPA] was not the operative cause of [Mobil's and Marathon's] failure to obtain the required permits," Pet. App. 2a, and second, that the repeal of the OBPA absolved the Government of any liability for its action, *id.* 13a. In its Brief, Mobil demonstrated conclusively that the Federal Circuit erred in relying on "causation" in a case involving restitution and on a post-lawsuit retraction to cure an anticipatory repudiation.

Having no effective answer to Mobil's arguments, *see also* Mobil Op. Cert. Reply 1, 5, the Government falls back on two positions that are wholly unsupported by the Federal Circuit's opinion: (1) that the OBPA did not constitute a "material breach" of Petitioners' leases and (2) that Mobil has waived its claims.[1] Neither argument can save the decision below.

A. Material Breach.

1. *The Undisputed Facts.* a. While the Government did not promise that Mobil would succeed in finding oil or gas, the Government *did* promise that it would approve Mobil's POEs, PODs, and drilling permits if they comply with the OCSLA. *See* Lease § 1, Marathon Pet. App. 175a (leases issued "pursuant to" and "subject to" the OCSLA); *see also* Pet App. 70a, 72a (Government promised Mobil a

---

[1] We deal below, *see* p. 2 n.3, with the Federal Circuit's unexplained (and inexplicable) statement that there was "no evidence of a breach of contract by the United States." The Government's third argument – that Mobil has received all of the remedy it deserves – is merely a corollary of its material breach argument.

specific "regulatory process").[2] In consideration of that promise, Mobil paid the Government up-front bonuses totaling $78 million.

The OBPA clearly compelled a breach of this duty. Without amending the OCSLA, the OBPA superseded the OCSLA plan- and permit-approval process for which Mobil had contracted and replaced it with an altogether different and much more onerous scheme that imposed OBPA requirements for the approval of "*any* exploration plan," "*any* development and production plan," "*any* application for permit to drill," or "*any* drilling" on "*any* lands" of the North Carolina OCS. OBPA § 6003(c)(1) (emphasis added). Thus, the OBPA applied not only to Mobil's POE for its first exploratory well, but also to every subsequent POE, POD, and drilling permit that Mobil would need throughout the life of the leases. Even the Federal Circuit agreed that the OBPA, having been enacted in 1990, was not an "applicable statute" to which the 1981 leases were subject: "To read the [leases] ... as incorporating [the OBPA] ... would raise serious questions about illusory contracts, and perhaps ... constitutional concerns." Pet. App. 10a.[3]

b. There is no merit in the Government's suggestion that the OBPA was simply a means of "implementing" the pre-existing "applicable statutes" to which Mobil's leases were subject. Gov't Br. 23. NEPA's requirements had been fully satisfied prior to the OBPA by DOI's unprecedented 2000-page environmental report, which fully supported DOI's NEPA "Finding Of No Significant Impact." J.A. 139. The OCSLA's POE approval requirements had been met on the basis of *existing* information, exactly as required by OCSLA § 1346(d) and reflected in DOI's finding that the POE was "approvable in all respects" but for the OBPA's moratorium. Marathon Pet. App. 194a. Moreover, the OBPA addressed only the Secretary of the Interior's responsibilities, not the State's or Secretary of Commerce's under the CZMA.

c. After receiving the OBPA scientific panel's report, nearly a year after it was due, *see* Mobil Br. 8, Secretary Lujan reported to Congress in April 1992 that he had sufficient information "to make a reasoned decision about the activities presently proposed ...." Marathon Pet. App. 201a. He nonetheless acceded to the Panel's recommendation to complete two additional studies – which ultimately were not completed until 1994 – before he could approve Mobil's POE for its first exploratory well. He also agreed with the Panel that additional environmental information would be required for each and every stage of OCS development through "post production." *See id.* In doing so, the Secretary interpreted the OBPA as requiring years of additional studies not only for Mobil's first exploratory well but also for every subsequent exploratory, delineation, and production well. *See id.* 199a. *See generally Chevron U.S.A. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Thus, as the Government conceded below, "those additional potential activities remained barred by the OBPA [even] after the Secretary's 1992 OBPA certification." Fed. Cir. Br. 30. Moreover, Secretary Lujan reported that further studies for

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[2] As only one example, pursuant to OCSLA § 1340(c) and § 1 of the leases, the Government agreed to approve Mobil's initial POE "within thirty days of its submission," unless it was defective under the OCSLA.

[3] The Federal Circuit's statement that "there is no evidence of a breach of contract by the United States," Pet. App. 16a, cannot be reconciled with its recognition that the OBPA was not authorized by § 1 of the leases, *see id.* 9a-10a. Instead, as Mobil has previously noted, *see* Mobil Br. 22 n.19, this statement can only be understood in the context of the court's erroneous reliance on causation.

these activities would "not begin in earnest prior to reviewing the initial exploration drilling." Marathon Pet. App. 202a.[4]

Consequently, the OBPA constituted (1) an open-ended prohibition (2) on the approval of any POE, any POD, or any drilling permit (3) for every well that Mobil might need to drill offshore North Carolina, until the Act's requirements were satisfied. The OBPA thus pervaded the entire contractual relationship between Mobil and the Government and constituted a wholesale restructuring of the bargain the parties had struck in 1981.

2. *The Settled Law.* The Government recognizes that the issue of materiality turns on the application of "basic principles of contract law," Gov't Br. 24-25 (quoting *United States v. Allegheny County*, 322 U.S. 174, 183 (1944)). However, the Government does not even mention the *Restatement (Second) of Contracts* (1981), "from which [courts are] inclined to fashion ... federal common law rule[s]" since the principles contained in the *Restatement* "represent the 'prevailing view' among the states." *Bowden v. United States*, 106 F.3d 433, 439 (D.C. Cir. 1997) (quoting E. Allan Farnsworth, *Farnsworth on Contracts* § 7.3 (1990)). All five of the factors set forth in § 241 of the *Restatement*

[4] Contrary to the Government's suggestion, Secretary Lujan's April 1992 certification did *not* cure the breach precipitated by the OBPA. He was not acting "voluntarily," Gov't Br. 15, or "on his own initiative," *id.* at 35, in further refusing to "issue a permit, approve the exploration plan, or allow any drilling," Marathon Pet. App. 202a, because the OCSLA directed that he "shall" approve Mobil's POE within 30 days. OCSLA § 1340(c)(1). Rather, he was acting pursuant to the explicit recommendation of the scientific panel, which the OBPA created, *see* OBPA § 6003(e), and which required the Secretary to abide by its recommendations or to provide Congress with his "detailed justification" for departing from those recommendations, *see id.* § 6003(c)(3)(A).

for determining whether a breach is material condemn the Government's argument.[5]

a. *Performance Reasonably Expected.* The first factor in determining whether a breach is material is "the extent to which the injured party will be deprived of the benefit which he reasonably expected from the exchange." *Restatement, supra*, § 241 cmt. b. The focus is on the parties' "expect[ations]" at the time of "the exchange."[6] When Mobil entered into the "exchange" at issue here in 1981, it reasonably "expected" that the Government would abide by its promise – the principal one the Government made in return for $78 million – to approve POEs, PODs, and other drilling permit applications according to the well-defined schedules prescribed in the OCSLA and incorporated by reference into § 1 of the leases. When Congress enacted the OBPA, it simply discarded the OCSLA's approval process and thus deprived Mobil of the principal performance that it expected from the Government. *See generally* I George E. Palmer, *The Law of Restitution* § 4.5, at 410 (1978) ("In deciding whether the breach is essential enough to justify restitution, a court should be concerned primarily with the objective of the plaintiff in seeking the performance promised by the defendant.").

Ignoring altogether the leases' specific incorporation of the OCSLA, the Government and its *amici* cite *Secretary*

[5] Although all five *Restatement* factors confirm the Court of Federal Claims' finding of materiality, a plaintiff need not satisfy all five conditions to prevail. *See Restatement, supra*, § 241 cmt. a.

[6] *See also Restatement (First) of Contracts* § 275(a) (1932) (considering "[t]he extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated"); *Link v. Department of the Treasury*, 51 F.3d 1577, 1583 (Fed. Cir. 1995) (finding a material breach where the injured party was "deprived of the full benefit ... *for which he had bargained*").

of the Interior v. California, 464 U.S. 312 (1984), in suggesting that OCS leases confer no rights at all. But nothing in *Secretary of the Interior*, *id.* at 337, 339 (holding that OCS lease sales are not subject to the CZMA and referring to an OCS lessee's "priority" in obtaining permits), sustains the Government's unilateral and drastic revision of the agreed-upon process for plan and permit approvals under the OCSLA, as occurred here. To the contrary, the Court's opinion in that case in careful detail discusses the OCSLA approval process without *any* suggestion that lessees do not have important contractual rights regarding that process. *See id.* at 335-41.

Section 241's emphasis on the "extent" of the breach reflects the commonsense proposition that "[a] quantitatively serious breach is more likely to be considered material." John D. Calamari & Joseph M. Perillo, *The Law of Contracts* § 11.18, at 415 (4th ed. 1998). The repudiation occasioned by the OBPA was "quantitatively serious" in at least two respects. First, the Government's principal promise to Mobil, in return for the $78 million that it paid for its leases, was that Mobil's applications would be approved if consistent with the OCSLA and other "applicable" statutes. The OBPA unquestionably breached that promise. *See* pp. 1-2 & n.3, *supra*.

Second, the OBPA flatly prohibited the Government from performing its contractual duties with respect to Mobil's exploratory well for a *minimum* of 13 months. Even the Government concedes that, as applied, the OBPA banned *all* activities for at least 20 months (*i.e.*, until Secretary Lujan's April 1992 report to Congress). In fact, the requirements imposed by the OBPA on Mobil's first POE were not lifted until July 1994, when the last OBPA-precipitated study for that well was completed almost four years after the POE should (and *would*) have been approved under the OCSLA. The OBPA's prohibitions as to all future drilling plans extended *ad infinitum*.

The *Restatement* cites *Northern Helex Co. v. United States*, 455 F.2d 546 (Cl. Ct. 1972), as an example of a case "based on the extent of deprivation of benefits to the injured party." *Restatement, supra*, § 241 reporter's note. In *Northern Helex*, the court expressed "not the slightest doubt" that the Government's failure to perform by withholding payments "over many months" constituted a material breach. *Northern Helex*, 455 F.2d at 550. *A fortiori*, there cannot be "the slightest doubt" that the breach here is material.[7]

In attempting to explain away Mobil's reasonable "expect[ations]" under its OCS leases, the Government contends that Mobil's leases were issued "subject" to statutes and regulations permitting lease suspension in certain circumstances, *see* Gov't Br. 23, and that "[u]nder the[se] applicable statutes and regulations, the United States was entitled to require a suspension of the leases to 'conduct an environmental analysis,'" *id.* 33. The Government argues that this "is precisely what Congress directed in enacting the OBPA," *id.*, and thus there was no breach. Neither the OCSLA nor applicable regulations sustain this argument.

The Government's argument that the "national interest" suspension authority of OCSLA § 1334(a)(1)(A) supports it here, *see* Gov't Br. 31-32, fails to report that such

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[7] The Government disingenuously relies on non-contract cases refusing to impose "coercive sanction[s]" due to government delay. Gov't Br. 37-38. But the imposition of a common law monetary remedy against the Government has never been equated with a prohibition against governmental conduct. *See Winstar*, 518 U.S. at 881-84. Thus, the Government's refusal to perform on the timetable promised in a contract has frequently been deemed a material breach without any suggestion that non-contract cases limit the available remedy. *See, e.g., Pinewood Realty Ltd. Partnership v. United States*, 617 F.2d 211, 215 (Cl. Ct. 1980) (one month delay in conveying property); *Northern Helex*, 455 F.2d at 550 (two year delay in payment); *Overstreet v. United States*, 55 Cl. Ct. 154, 174 (1920) (five week delay in installment payment).

suspensions may be granted only "*at the request of a lessee*." The only OCSLA authority for a suspension without the lessee's consent applies where the Secretary finds a "threat of *serious*, *irreparable*, or *immediate* harm or damage" to life, property, mineral deposits, or the environment. OCSLA § 1334(a)(1)(B) (emphasis added).[8] There has never been any contention that these circumstances applied here; DOI had found just the opposite, *see* p. 3, *supra*, and *at most*, the OBPA suggested that existing environmental studies purportedly had not "allayed concerns" about the adequacy of environmental information. OBPA § 6003(b)(7).[9]

The Government's reliance upon 30 C.F.R. § 250.10(b)(4),[10] which allows the Secretary to suspend a lease when it "is necessary ... to conduct an environmental analysis," Gov't Br. 32, is similarly misplaced. This argument simply recycles and repeats under a different guise the Government's untenable contention that the OBPA, although not an "applicable statute" to which the leases were subject under their express terms, merely implemented pre-existing "applicable statutes" such as NEPA and the OCSLA. *See* pp. 2-3, *supra*. But in agreeing to be bound by "applicable statutes," Mobil surely did *not* agree to a suspension for an "environmental analysis" required by an *inapplicable* statute like the OBPA.

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[8] This suspension power was doubtless the one referred to in the House report cited by the Government as authorizing a more-than-30-day delay in approving a POE, *see* Gov't Br. 32 n.11.

[9] The Government's reference to its powers to cancel OCS leases "under the terms of the OCSLA," Gov't Br. 8, does not aid it here, because such cancellation must be accompanied by compensation. *See* OCSLA § 1334(a)(2)(C).

[10] 30 C.F.R. § 250.110(b)(4) as recodified.

DOI never found – nor could it have found – that the OCSLA, NEPA, or any other "applicable statute" made it "necessary" to suspend the leases to conduct an environmental analysis. Indeed, only two months prior to the OBPA's enactment, DOI completed its 2000-page Environmental Report on Mobil's proposed well – calling it "the most extensive and intensive environmental examination that had ever been afforded an exploration well in the OCS program," J.A. 179 – and concluded under NEPA that Mobil's well "would not result in *any* significant environmental impacts." Pet. App. 5a (emphasis added); *accord* J.A. 139 (finding of no significant impact).

DOI itself recognized this proposition, because it did not invoke § 250.10(b)(4) to justify the suspensions when the OBPA was enacted in 1990 (as the Government does now). Instead, DOI acknowledged that it was suspending Mobil's leases *in order to comply with the OBPA*, citing § 250.10(b)(7) as authority for its action. J.A. 129-30, 132. Tellingly, in its brief to this Court, the Government does not even mention § (b)(7) – which allows suspensions when judicial decrees "prohibit[]" OCS activities "or the permitting of those activities."[11]

The clash between the OBPA and Mobil's "expect[ations]" upon entering the leases could not be

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[11] In the Federal Circuit, the Government argued that § (b)(7) was "totally irrelevant" and "clearly demonstrates a mistake" by DOI. Fed. Cir. Br. 26. However, it was not necessary to suspend operations under § (b)(4) to conduct an environmental analysis, because the OBPA itself guaranteed that there could be no operations during the pendency of the studies required by that Act. Section (b)(7) is used where a judicial decree, or similar outside factor – here the OBPA – has "prohibit[ed]" OCS activities, and thus § (b)(7) serves only as a device to "suspend" the running of a lease's primary (here 10-year) term and thereby to ensure that the lease is extended during the period of such prohibition.

clearer. As the Court of Federal Claims found – and as the Government has not seriously disputed –

> [C]ommon sense suggests that no sophisticated oil and gas company with many years of experience in drilling for oil in offshore leased tracts would knowingly agree to pay the huge, up-front considerations here involved for such tenuous and unilaterally interruptable drilling rights.

Pet. App. 63a.

b. *Adequacy of Compensation.* In determining materiality, courts should also consider "the extent to which the injured party can be adequately compensated for the part of th[e] benefit of which he will be deprived." *Restatement, supra*, § 241(b). An explanatory note indicates that § 241(b) is concerned primarily with an injured party's ability to prove its damages with sufficient certainty. *See id.* cmt. c.

Here, it would have been impossible to calculate the actual damages Mobil suffered from the OBPA: There was no way of predicting either in 1990 (when the Act was passed) or in 1992 (when the suits were filed) (1) whether the OBPA would ever allow DOI to grant all of the permits that Mobil would need over the life of the leases to explore, produce, and develop the oil and gas that might be found offshore North Carolina or (2) if such permits were ultimately granted, whether the economic, technical, or other considerations Mobil would then confront would make it feasible for Mobil to proceed with exploration and production.

By contrast, Mobil's action for rescission of the lease agreements and restitution of its up-front bonus payments does not pose any problems of proof. As the foremost scholar of the law of restitution has observed, "proof of

damages may present unusual difficulties, whereas proof of the value of [a plaintiff's] performance is relatively easy, and restitution is the means by which he recovers the value of that performance." I Palmer, *supra*, § 4.1, at 368. Indeed, citing the relative facility of proving restitution as compared to consequential damages, Professor Corbin noted that "even courts that do not like to recognize an anticipatory repudiation as a breach for which an action for damages will lie are willing to maintain an immediate action for restitution of the consideration paid." 4 Arthur L. Corbin, *Corbin on Contracts* § 978, at 929-30 (1951). *See also* Mobil Br. 25-26.

c. *Forfeiture.* The *Restatement* also focuses on "the extent to which the party failing to perform or to offer to perform will suffer forfeiture." *Restatement, supra*, § 241(c). The more a breaching party has performed, the more likely it will, on a finding of material breach, suffer forfeiture of any part performance it has rendered; consequently, "a failure is less likely to be regarded as material if it occurs late, after substantial preparation or performance, and more likely to be regarded as material if it occurs early, before such reliance." *Id.* cmt. d; *accord* Calamari & Perillo, *supra*, § 11.18, at 414 ("The earlier the breach the more likely it will be regarded as material."). Courts should therefore consider "to what extent, if any, the contract has been performed at the time of the breach." Calamari & Perillo, *supra*, § 11.18, at 414.

Here, although the Government's repudiation did not occur until nine years after the leases were executed in 1981, it occurred *before* DOI had approved Mobil's initial POE pursuant to OCSLA § 1340(c)(1), which both lower courts correctly described as the "first step" in the OCS process. Thus, there was no threat in this case that the Government would lose any of its part performance *because it had not provided any*.

d. *Cure.* The likelihood that a breach will be cured is another relevant consideration in determining materiality. *See Restatement, supra*, § 241 (d) & cmt. e. Here, there was no such possibility because DOI was required to comply with the OBPA until Congress repealed the Act, three-and-a-half years after Mobil filed suit and one month after the decision of the Court of Federal Claims, when it was too late to retract the repudiation and thus cure the Government's earlier repudiation. Mobil Br. 35-37.

e. *Lack of Good Faith.* Finally, a breaching party's failure to adhere to accepted standards of good faith and fair dealing is "a significant circumstance in determining whether a failure is material ...." *Restatement, supra*, § 241 cmt. f; *see also Link*, 51 F.3d at 1582 (suggesting that bad faith alone is sufficient to support a determination of material breach). The undisputed facts of this case confirm DOI Assistant Secretary O'Neal's description of the OBPA as an act of "bad faith." J.A. 182.

Central to the breaching party's good faith is whether the breach was intentional. Indeed, § 275(e) of the *Restatement (First) of Contracts* (from which the present-day § 241(e) is derived) observes that "the willfulness of the breach ... so far increase[s] the demerit of the wrongdoer that the law is less inclined if a breach is willful to require the injured party to perform." *Restatement (First) of Contracts* § 275(e) & cmt. a; *accord* Calamari & Perillo, *supra*, § 11.18, at 414-15 & n.13 ("[W]illful breach is more likely to be regarded as material."); 6 Samuel Williston, *A Treatise on the Law of Contracts* § 842, at 171 (3d ed. Walter H.E. Jaeger, ed., 1962) ("Willfulness of the breach ... is an important element in the case."); *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 891 (N.Y. 1921) (Cardozo, J.) ("The willful transgressor must accept the penalty of his transgression.").

It is undisputed in this case that the Government's repudiation of Mobil's leases was intentional, for the

Government abandoned its arguments under the sovereign acts and unmistakability doctrines. Accordingly, it did not challenge on appeal the Court of Federal Claims' finding that the OBPA was "narrowly tailored to target" Mobil's leases, Pet. App. 86a, and "specifically enacted to delay indefinitely plaintiffs' exploration of the OCS offshore North Carolina," *id.* 91a. *See generally United States v. Winstar Corp.*, 518 U.S. 839, 898 & n.45 (1996) (government actions "directed principally and primarily at plaintiffs' contractual right" are not sovereign acts).

Both the text and the clear legislative history[12] of the OBPA confirm that the Act was targeted at Mobil's proposed well and was specifically intended to abrogate Mobil's lease rights. *See generally* Mobil Br. 5-7. The text of the OBPA refers by name to "the Mobil Oil Company," OBPA § 6003(b)(7), and supporters and opponents of the OBPA alike described the Act as a "moratorium" on Mobil's exploration and production activities, *see* 136 Cong. Rec. 22,275 (1990) (Rep. Jones); J.A. 113 (DOI Secretary Lujan).[13]

According to the *Restatement*, "[g]ood faith performance ... of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified

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[12] In *Winstar*, this Court indicated its willingness to examine legislative history in determining questions of contract breach, where the pitfalls often associated with the consideration of legislative history in the context of statutory interpretation are not implicated. *See Winstar*, 518 U.S. at 902 n.50.

[13] As these citations demonstrate, the Government's suggestions that the "legislative record" does not contain evidence of the OBPA's purpose, *see* Gov't Br. 33 n.13, and that the OBPA was "enacted out of a concern of Congress" that DOI "give proper attention to" NEPA and the CZMA, *see id.* 12, are simply false. In any event, the Government's failure to appeal the trial court's finding that the OBPA was "specifically enacted to delay indefinitely" Mobil's OCS activities precludes it from now seeking to attribute a different purpose to the Act.

expectations of the other party." *Restatement, supra*, § 205 cmt. a. Far from acting with "faithfulness to an agreed common purpose" of the OCS leases and "consisten[tly] with [Mobil's] justified expectations," the OBPA was aimed specifically and intentionally at undermining Mobil's lease rights.

3. *Causation/Repeal.* Ignoring the relevant factors establishing the materiality of its breach, the Government simply plows forward, acting as if the repeal of the OBPA somehow relieves it of its breach. Specifically, the Government contends that "[p]etitioners' ability to undertake exploration activities under these leases was at all times – both before enactment of the OBPA and after its repeal – blocked by North Carolina's objections under the CZMA." Gov't Br. 36. This, however, is not an argument about breach or materiality – it is an argument about causation. Indeed, in the very next sentence of its brief, the Government unabashedly invokes the concept of "but for" causation: "*Even if the OBPA had never been enacted*, petitioners would ... have experienced precisely the same delay in proceeding with the proposed operations" as a result of North Carolina's CZMA objections. *Id.* (emphasis added). Such arguments, in the face of Mobil's unrefuted demonstration that both causation and a post-complaint OBPA repeal are irrelevant to a claim for restitution, in and of themselves expose the weakness of the Government's arguments in this case.[14]

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[14] Moreover, as demonstrated in Mobil's Opening Brief, North Carolina's objections to the first POE and the NPDES permit under the CZMA were curable by performing the studies North Carolina demanded (or by no-discharge operations that would remove the need for an NPDES permit). Mobil Br. 9 n.7, 24 n.21. It is no answer to speculate that the delay precipitated by North Carolina's CZMA objections *might* have extended beyond Mobil's first POE to affect subsequently submitted plans and permit applications by virtue of the State's demand for still more (...continued)

B. Waiver.

The Government's waiver argument – which is premised on what Professor Palmer has called the "outmoded election of remedies doctrine," I Palmer, *supra*, § 4.13, at 481 – is substantially different than the one advanced in the trial court. *See* p. 18 n.17, *infra*. The Government now contends that Mobil "waived" its claim for material breach when, after the OBPA's enactment, it (1) continued to urge performance by "submitting a proposed plan of exploration," (2) attempted to protect its rights by "pursuing administrative proceedings" challenging North Carolina's CZMA objections, and (3) sought suspension of its leases pending those proceedings. Gov't Br. 42. This waiver argument fails for three independent reasons.

1. Like the rest of the Government's brief, the waiver argument incorrectly assumes that the extent of the breach was limited to the enactment of the OBPA and the Secretary's failure to approve Mobil's first POE within the 30 days required by OCSLA § 1340(c)(1). However, the Secretary's interpretation and application of the OBPA, as well as the fact that the Government would not cure its repudiation, only became clear when Secretary Lujan limited his April 1992 certification under the Act to Mobil's first POE and then refused to approve *even that POE* pending the completion of years of additional OBPA studies.

A month after the Secretary's April 1992 decision so interpreting and applying the OBPA, Conoco, Inc., filed the

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studies. In contrast to the CZMA, which introduced only a speculative *possibility* that Mobil's plans and applications *might* be delayed, the OBPA imposed a *certainty of substantial (and perhaps indefinite) delay for every permit*.

complaint initiating this case and provided notice to Mobil under Court of Federal Claims Rule 14. J.A. 1. On July 23, 1992, Mobil filed a motion for an enlargement of time to postpone the filing of its complaint "pending final Congressional action on the bills" that potentially would have mooted the issues in this case by providing statutory compensation for the North Carolina (as well as other OCS) leases. *See* Fed. Cir. App. 1005, 1008. Mobil filed its complaint on October 28, 1992, shortly after the 102nd Congress ended its session without providing a statutory resolution to the issue. J.A. 2. A waiver cannot occur unless "the injured party knows, or has reason to know, of the relevant facts ...." II E. Allan Farnsworth, *Farnsworth on Contracts* § 8.19, at 511 (2d ed. 1998). Here, Mobil promptly filed suit upon learning the "relevant facts."

2. As Mobil has consistently pointed out, the enactment of the OBPA constituted an anticipatory repudiation of Mobil's leases. By legislating and implementing new and burdensome requirements in violation of the leases, the Government announced – before the time for performance under those leases had arrived – that it either could not or would not perform its obligations under the leases in the manner the parties had agreed. It is settled beyond dispute that, in the case of an anticipatory repudiation, "[t]he injured party does not change the effect of a repudiation by urging the repudiator to perform in spite of his repudiation or to retract his repudiation." *Restatement*, *supra*, § 257; *accord* U.C.C. § 2-610(b) (1989) (An injured party may "resort to any remedy for breach ... even though he has notified the repudiating party that he would await the latter's performance and has urged retraction."); 4 Corbin, *supra*, § 981, at 940 ("[M]ere delay in bringing a suit does not disentitle the injured party to relief. ... [O]ne who has received a definite repudiation is not to be penalized for his efforts to bring about its retraction and to get that which is due without a law suit.").

Mobil was not required to sue immediately following enactment of the OBPA without first learning the extent of the Government's breach and encouraging the Government to honor its obligations. When the scope of the OBPA became clear by virtue of the Secretary Lujan's April 1992 interpretation of the Act and congressional remedies were exhausted, Mobil promptly brought this action seeking restitution of its bonus payments. That is all the law required.[16]

3. An injured party waives its remedy for breach due to non-performance only by accepting the breaching party's continued performance *under the contract*. *See, e.g.*, *Restatement*, *supra*, § 373 cmt. a (party loses its right to restitution only by "acceptance or ... retention ... of performance" with knowledge of defects); *id.* § 246(1) (waiver only upon injured party's "acceptance or ... retention for an unreasonable time of the [breaching party's] performance"); II Farnsworth, *supra*, § 8.19, at 514 (same). The Government's own cases confirm this limitation on the waiver doctrine. *See, e.g.*, *ARP Films, Inc. v. Marvel Entertainment Group, Inc.*, 952 F.2d 643, 649 (2d Cir. 1991); *Cities Serv. Helex, Inc. v. United States*, 543 F.2d 1306, 1313-14 (Cl. Ct. 1976).

Here, Mobil accepted no performance from the Government because it tendered none – the OBPA prevented the Government from rendering even the first performance asked of it, *see* p. 11, *supra*, and even after the Act's requirements were finally satisfied, DOI *never* approved Mobil's POE, *see* Marathon Br. 15. While the Government

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[16] The Government apparently misses the irony of its waiver argument faulting Mobil for filing a POE for its four Manteo tracts, *see* Gov't Br. 40, 42, while simultaneously contending that Mobil has no right to complain of the OBPA regarding its one non-Manteo tract because it did not file a POE for that tract, *see id.* 39 n. 20.

may have taken other actions after enactment of the OBPA – *e.g.*, completion of the studies that were required by the Act, resolution by the Secretary of Commerce of the CZMA appeal – those actions were not part of the Government's promised "performance" under the leases.

Moreover, the Government has not ventured beyond the vaguest of generalities, *see* Gov't Br. 42, in attempting to explain how it "*substantial[ly]* change[d] [its] position in reliance" on Mobil's supposed affirmance of the lease contracts – a necessary element of its waiver claim. 5A Corbin, *supra*, § 1220, at 461 (emphasis added); *accord Riess v. Murchison*, 503 F.2d 999, 1008 (9th Cir. 1974) (requiring "*substantial* change of position in reliance" on plaintiff's action); *North American Graphite Corp. v. Allan*, 184 F.2d 387, 389 (D.C. Cir. 1950) (requiring "*material[]* change"). The administrative expenses incurred by the Government in receiving – but not approving – Mobil's POE, processing Mobil's CZMA appeal, and granting suspensions are *de minimis* compared to the restitution owed to Mobil and Marathon in the light of the Government's material breach.[17]

Finally, the Government has not even suggested that, in seeking suspensions and taking other actions to preserve its rights, Mobil actually "intended" to relinquish its claim for material breach.[18] *See, e.g., Havoco of America, Inc. v.*

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[17] The Government never argued in the Court of Federal Claims that its receipt of Mobil's POE or the Department of Commerce's processing of Mobil's CZMA appeal could serve as predicates for a waiver argument. Accordingly, the Government offered no evidence concerning the administrative expenses entailed in these actions. The same is true regarding the September 1992 suspensions sought by Mobil, which was the only predicate for the Government's waiver argument in that Court. *See* Fed. Cir. App. 1004.

[18] The Government's reliance on Mobil's suspension requests is flawed in other respects. First, the Government never explains how the grant of a suspension order in any way constitutes "performance" of its (...continued)

Hilco, Inc., 799 F.2d 349, 354 (7th Cir. 1986) ("[A]n essential element of waiver is that the injured party intended to affirm the contract and intended to abandon his right to recover damages. 'If the intention to waive is implied from conduct, the conduct should speak the intention clearly.'" (quoting *Bankers Trust Co. v. Pacific Employers Ins. Co.*, 282 F.2d 106, 111 (9th Cir. 1960)); *Ducheneaux v. Miller*, 488 N.W.2d 902, 911 & n.8 (S.D. 1992) ("[I]ntent to acquiesce or waive is essential to establishing a waiver to a breach of contract."); *Galesburg Clinic Ass'n v. West*, 706 N.E.2d 1035, 1037 (Ill. Ct. App. 1999) ("In the context of a breach of contract, waiver is the express or implied voluntary and intentional relinquishment of a known and existing right."). Mobil's initiation of this litigation and its subsequent active pursuit of the case conclusively show that it never intended to acquiesce in the Government's breach, to affirm the repudiated contract, or to waive its claims.

C. Remedy.

As Mobil pointed out in its Opening Brief – and as the Government has not disputed – upon a determination that the OBPA materially breached the OCS leases, Mobil is entitled to elect restitution as its remedy in this case. Mobil Br. 23-35. The Government's argument that Mobil's only remedy is an extension of its leases, *see* Gov't Br. 43-44, collapses with the refutation of its material breach argument.

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obligations under the leases. Second, the Government relies on correspondence that is not contained in the record. *See* Gov't Br. 42-43 & App. 1a-6a.

CONCLUSION

For the reasons stated above, the judgment of the Federal Circuit should be reversed.

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IN THE
Supreme Court of the United States

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

MARATHON OIL COMPANY,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF OF MARATHON OIL COMPANY

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REPLY BRIEF OF MARATHON OIL COMPANY

The government's brief contradicts both the plain language of petitioners' leases and settled common-law rules of contract construction, breach, and remedies. *First*, the government's argument that the leases incorporated future statutes such as the Outer Banks Protection Act ("OBPA") is contradicted by the plain language of the leases, Pet. App. 175a (§ 1),[1] and was rejected by both courts below. See *id.* at 65a-66a; *id.* at 12a. This Court has repeatedly rejected attempts to read into government contracts a reserved government right to nullify unilaterally its own obligations by enacting subsequent legislation. See *infra*, at 1-9. *Second*, the government's breach was plainly material because it repudiated the very performance for which petitioners had bargained when they paid more than $156 million in up-front bonuses. See *infra*, at 9-14. *Third*, restitution is a remedy for material breach even when expectation damages are uncertain or could be proven to be zero. See *infra*, at 15-16. *Fourth*, there was no waiver of the government's material breach because the government did not provide any performance under the leases after its breach, and petitioners did not accept any such performance. See *infra*, at 16-20.

I. THE OBPA REPUDIATED PETITIONERS' OCS LEASES, ENTITLING THEM TO RESTITUTION.

A. Enactment Of The OBPA Repudiated The Government's Lease Agreements With Petitioners.

It is conceded common ground, see U.S. Br. 31, that petitioners' leases each incorporated the provisions of the Outer Continental Shelf Lands Act ("OCSLA") and the regulations thereunder by reference and made them part of the contracts. The incorporated OCSLA in turn set forth detailed and precise time frames and substantive standards

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[1] Citations to "Pet. App." refer to the appendices to the petition filed in No. 99-253.

for government action on petitioners' requests for its approval of the plans and applications necessary for them to explore and develop their Outer Continental Shelf ("OCS") lease tracts. Thus, the government does not dispute that through its incorporation of the OCSLA, the lease contracts imposed on the United States the "necessary reciprocal obligation" to "timely and fairly consider —not necessarily approve, but at least promptly consider —exploration plans properly submitted." Pet. App. 76a.

The government contends, however, that this very same incorporation of the OCSLA also "authorize[d]," U.S. Br. 31, the government to exercise the unilateral power to nullify its own obligation of "timely and fair[] consider-[ation]." Specifically, the government contends, see *id.* at 31-32, that (1) when the leases incorporated the OCSLA and the regulations thereunder, they also "contemplated and authorized," *id.* at 31, that Congress could by future statute make any substantive change to the government's consideration of petitioners' plans that the Secretary of the Interior (the "Secretary") was authorized to make by regulation; (2) the actions mandated by the OBPA could have been required by the Secretary under the OCSLA and its regulations; (3) therefore, the OBPA's "drastic unilateral interference," Pet. App. 67a, with the OCSLA's regulatory scheme "was precisely the type of delay contemplated and authorized by the parties under the[] leases," U.S. Br. 31. As we demonstrate, the government's interpretation is contrary to the plain language of the leases, was rejected by *both* courts below, and is inconsistent with both common sense and numerous opinions of this Court on government contract interpretation.

1. a. The government's argument that the leases "contemplated and authorized" the OBPA, U.S. Br. 31, ignores the critical contractual language. Section 1 of each lease expressly provided that it was:

> [S]ubject to [1] [the OCSLA]; Sections 302 and 303 of the Department of Energy Organization Act ["DEOA"] . . .; [2] all regulations issued *pursuant to such statutes and in existence upon the effective date of th[e] lease[s]*; [3] all regulations issued *pursuant to such statutes in the future* which provide for the prevention of waste and the conservation of the natural resources of the Outer Continental Shelf, . . . and [4] all other applicable statutes and regulations.

Pet. App. 175a (§ 1) (emphases added). Section 1's carefully-nuanced incorporation provisions make clear that the "drafters knew how to [—but did not—] specify . . . future or subsequent legislation because they did exactly that in connection with future regulations." *Id.* at 65a. As the Court of Federal Claims held, the contractual restriction to future regulations "pursuant to" the OCSLA and the DEOA would be "ineffective," "meaningless," and "superfluous," *id.* at 66a, if the incorporation of the OCSLA were interpreted to include, as the government contends, the requirements mandated by *future*, subsequently-enacted statutes.[2] The government's interpretation is thus contrary to basic contract interpretation rules. See *Fortec Constructors* v. *United States*, 760 F.2d 1288, 1292 (Fed. Cir. 1985); see also *Hughes Communications Galaxy, Inc.* v. *United States*, 998 F.2d 953, 958 (Fed. Cir. 1993) (one provision canot be construed to render a more specific term "superfluous and meaningless"). The Federal Circuit agreed: "To read the original contract between the parties as incorporating all future actions, whether by statute or regulation, by one of the parties would raise serious questions about illusory contracts . . . ." Pet. App. 12a. The government simply ignores these rulings.

b. In attempting to read the OBPA into the leases, the government relies heavily on one provision of the incorpo-

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[2] The government has correctly abandoned, both in this Court and in the Court of Appeals, its prior contention that the OBPA, which was enacted nine years after the leases were executed, was an "other applicable statute[]" under § 1 of the leases.

rated OCSLA, 43 U.S.C. § 1334(a), but ignores its critical language. The first sentence of § 1334(a) limits the Secretary to promulgating "*regulations* . . . necessary to carry out" the "provisions of *this subchapter*." *Id.* (emphases added). "[T]his subchapter" means the OCSLA, 43 U.S.C. §§ 1331-1356. Thus, the restrictive language of § 1334(a) confirms that the leases were not subject to the requirements of future statutes.

Moreover, the OBPA is not a "regulation." Not only was it promulgated by Congress, not the Secretary, but the common meaning of "regulation" is a generally applicable provision of law. Cf. Exec. Order No. 12866 § 3(d), 58 Fed. Reg. 51735, 51737 (1993) (defining "regulation" as "an agency statement of general applicability . . . ."). As the Court of Federal Claims found, however, the OBPA "was not an act of public, general applicability," Pet. App. 96a, but rather was "narrowly tailored to target the specific contracts and sought to abate the accompanying rights here at issue," *id.* at 91a. See also Marathon Br. 10-11 & n.7. The OBPA did *not* amend the OCSLA and was only applicable to North Carolina leases. The generally applicable "regulations" promulgated by the Secretary under the OCSLA remained effective and unchanged by the OBPA.

c. Finally, the government simply overreads *North American Commercial Co.* v. *United States*, 171 U.S. 110 (1898). There, the lease expressly provided that the private lessee would " 'abide by *all* rules and regulations that the Secretary of the Treasury has heretofore or may *hereafter* establish or make *in pursuance of law* concerning the taking of seals,' " including " 'any restrictions or limitations upon the right to kill seals.' " *Id.* at 125 (emphases added). When a treaty limited seal killing in 1893, the Court merely held that "the treaty was nothing more" than a "direct[ion to] the Secretary *by law* to restrict the killing." *Id.* at 134 (emphasis added). Here, unlike *North*

American, the contract was *not* made subject to all future regulations made " 'in pursuance of law,' " *id.* at 125, but rather only to certain future regulations made "pursuant to such statutes," Pet. App. 175a—*i.e.*, pursuant only to the incorporated OCSLA and DEOA. See *supra*, at 2-4.

2. a. The government is also wrong that the actions mandated by the OBPA could have been required by the Secretary under 43 U.S.C. § 1334(a)(1)(A) & (B) or the OCSLA's existing regulations. Section 1334(a)(1)(A) only applies—in language omitted from the government's quotation, see U.S. Br. 31-32—"at the request of a lessee." Section 1334(a)(1)(B) could not have been used because, as the government's own contemporaneous admissions demonstrate, and the trial court found (quoting the statute), there was no "threat of serious, irreparable, or immediate harm" to the environment, and the government did not act on this basis. See Pet. App. 80a-84a. On June 1, 1990—just 2½ months before the OBPA was enacted—the Department of the Interior ("DOI") had completed a three-volume, 2000-page special environmental report that was "the most extensive and intensive environmental examination that had ever been afforded an exploration well in the OCS program." J.A. 179. Based on this report, on September 28, 1990—one month after the OBPA's enactment—the DOI issued an environmental assessment of the Manteo Unit's Plan of Exploration ("POE") that concluded that the proposed exploratory activities would have " '*no* significant impact' " on the environment. See J.A. 138-40 (emphasis added). See also Pet. App. 194a (Manteo Unit's POE "w[ould] have only negligible effect on the environment").[3]

[3] Although the OBPA declared Congress's "concerns about the adequacy of the environmental information available," Pub. L. No. 101-380, § 6003(b)(7), 104 Stat. 484, 555 (1990), the OBPA's findings did not conclude that exploration and development of North Carolina OCS tracts actually posed a risk of serious environmental harm.

Indeed, the government conceded below that, absent the OBPA, the Secretary would have approved the Manteo Units' POE within the 30-day period set out in the OCSLA. See U.S. Fed. Cir. Br. 39. This simply demolishes the government's argument that the OBPA did nothing that was not already provided for under the OCSLA or existing regulations. *See* Marathon Br. 13.

b. The government's reliance on 30 C.F.R. § 250.10 (b)(4) (1997) (now codified at 30 C.F.R. § 250.110 (b)(4)) is similarly misplaced. This regulation allows the "Regional Supervisor"—not Congress—to suspend a lease when "*necessary* . . . to conduct an environmental analysis.' *Id.* (emphasis added). This provision is obviously inapplicable because "the most extensive and intensive environmental examination that had ever been afforded an exploration well in the OCS program," J.A. 179, had already been completed.[4]

Indeed, the government ignores that in 1990 the DOI did not invoke § 250.10(b)(4) as a basis for the suspensions. On the contrary, the DOI's notices forthrightly stated that the leases were being suspended as a *consequence* of the OBPA's prohibition on the DOI's approving any POE or drilling permit application, or its permitting any drilling offshore North Carolina. See J.A. 129. See also Pet. App. 80a-81a. Indeed, the notices further stated that the

[4] The government's suggestion, *see* U.S. Br. 35, that petitioners acknowledged in 1992 that their leases "authorized" suspension for the performance of the environmental and socioeconomic studies mandated by the OBPA, *see* OBPA § 6003(d), is simply wrong. Following the DOI's 1992 decision to lift the suspensions it had imposed *sua sponte* in September 1990 as a "[c]onsequen[ce]" of the OBPA, J.A. 129, petitioners requested that their leases be resuspended because "[petitioners] continue[d] to be precluded by that Act [the OBPA] from exploration activity," *id.* at 170, and their appeals of the North Carolina's CZMA objections were still pending, *see id.* at 168-69. They did not request—or acknowledge—that their leases could be suspended under 30 C.F.R. § 250.10 (b)(4) for the OBPA-mandated studies.

leases were being suspended pursuant to 30 C.F.R. § 250.10(b)(7) (1997) (now codified at 30 C.F.R. § 250.110(b)(7)). See J.A. 129, 132. Section 250.10 (b)(7), however, does not authorize suspension for environmental studies, but rather only when "necessary to comply with *judicial decrees* prohibiting production or any other operation or activity, or the permitting of those activities." 30 C.F.R. § 250.10(b)(7) (emphasis added).[5] The government's *post hoc* litigation attempt to rely on a ground—§ 250.10(b)(4)—that was *not* the one that the government cited when it acted is unavailing. See *Johnson* v. *Branch*, 364 F.2d 177, 181 (4th Cir. 1996) (board's decision not to renew contract could be defended only on ground on which it actually relied); Pet. App. 80a-81a; cf. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947) (courts "must judge the propriety of [the agency's] action solely by the grounds invoked by the agency").

3. Absent the clearest possible contractual language, this Court has consistently refused to give government contracts the financially "irrational" interpretation that the government again seeks here—under which the government would have the unilateral right to cancel its essential contractual obligations by subsequently enacting new statutes. See, *e.g.*, *United States* v. *Winstar Corp.*, 518 U.S. 839, 862-64 & n.13, 909-10 (1996) (plurality opinion); *id* at 921 (Scalia, J., concurring in judgment); *id* at 913 (Breyer, J., concurring); *Lynch* v. *United States*, 292 U.S. 571, 577-78 (1934); *Appleby* v. *Delaney*, 271 U.S. 403, 412-13 (1926); *City of Detroit* v. *Detroit Citizens' St. Ry.*, 184 U.S. 368, 384-85, 389, 397-

[5] Indeed, the government stated below that the DOI's invocation of § 250.10(b)(7) was a "mistake." U.S. Fed. Cir. Br. 26. This remains a telling concession becauses it emphasizes that, consistent with § 1 of the leases, *no* regulation under the OCSLA permitted petitioners' leases to be suspended because of the enactment of a future statute.

98 (1902).[6] Indeed, without explicit contractual language to the contrary, incorporation in a government contract of statutes or regulations results in "incorporation of the then-current regulations," not of statutes or regulations as they "change" over time. *Winstar*, 518 U.S. at 868 (plurality opinion); *accord id.* at 922 (Scalia, J., concurring in judgment); *Wood* v. *Lovett*, 313 U.S. 362, 369-70 (1941); *Craft Mach. Works, Inc.* v. *United States*, 926 F.2d 1110, 1115 (Fed. Cir. 1991).

Even when, unlike here, a government contract provision expressly makes a private party's rights generally subject to *subsequent* statutes or regulations, this Court has not allowed the government to work a forfeiture of the private party's investment by revoking by statute or regulation effectively all of the government's obligations. For example, in *Lynch*, the "form [insurance contract] prescribed provided that the policy should be subject to *all amendments to the original Act*, [and] to *all* regulations then in force *or thereafter adopted*." 292 U.S. at 577 (emphases added). Nonetheless, the Court ruled that once an insured had paid premiums, it was a breach for either a statutory or regulatory change "to curtail the amount of the benefits" owed under the contract. *Id.* at 578. Cf. *City of Detroit*, 184 U.S. at 377-78, 384, 398 (although contract was expressly subject to "further rules, orders or regulations," this did not permit subsequent regulations that unilaterally revoked "material" terms of contract and destroyed prior investment).

Here, the government's position contradicts both sets of precedents. First, even though the contract's language expressly declines to incorporate *future* statutes or the requirements of future statutes, the government seeks such incorporation by implication. See *supra*, at 2-7. Second,

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[6] *Winstar* appropriately cited *Appleby* and *Detroit* because federal law controls contract interpretation in Contract Clause cases. *E.g.*, *Irving Trust Co.* v. *Day*, 314 U.S. 556, 561 (1942).

it seeks a forfeiture of petitioners' entire investment, to the government's direct pecuniary benefit.[7]

B. The OBPA's Repudiation Was Material.

The government argues that any breach was not "material" because the absolute and open-ended prohibition the OBPA placed on the government's performance of its contractual duties did not go to the " 'essence' " of the parties' agreement. See U.S. Br. 36. This simply mischaracterizes the law, the contracts at issue in this case, and petitioners' claims for restitution. The government also erroneously attempts to apply to the issue of material breach the same "harmless error" in hindsight theory that the Court of Appeals erroneously invoked as a causation (not materiality) theory in denying petitioners the remedy of restitution. See Marathon Br. 36-47.

1. The government's argument ignores the first rule of "material" breach: A breach is material when the defendant fails or refuses to render the very performance that it agreed to "exchange" for the plaintiff's performance. *E.g.*, *Restatement (Second) Of Contracts* § 241 cmt. b (1981); *id.* § 243(1) & cmt. a. See also Marathon Br. 33 (collecting authorities). Thus, if the defendant provides, or announces that it will provide, less than "substantial performance"—*i.e.*, less than " 'almost complete' " performance—its breach is material. II E. Alan Farnsworth, *Farnsworth On Contracts* § 8.16, at 442 & n.2 (1990). Here, the OBPA announced unequivocally that the government was refusing, for a potentially perpetual period, to provide the critical performance—timely and fair consideration—for which petitioners had bargained.

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[7] Finally, even if the lease contracts were ambiguous, they would have to be construed against the government, which was the exclusive drafter. *See United States* v. *Seckinger*, 397 U.S. 203, 216 (1970); *Hills Materials Co.* v. *Rice*, 982 F.2d 514, 516-17 (Fed. Cir. 1992); *Restatement (Second) of Contracts* § 206 (1981); *id.* § 207 cmt. a. *See also* Pet. App. 70a-71a n.10.

Petitioners' claims for restitution in this case do *not*, as the government suggests, see U.S. Br. 36-38, rest solely on the Secretary's OBPA-compelled failure to approve the Manteo Unit's POE within the 30-day period prescribed by the OCSLA under 43 U.S.C. § 1340(c)(1). On the contrary, petitioners' claims cover the OBPA's anticipatory repudiation of the government's duties under petitioners' leases with respect to (i) *all* of petitioners' OCS tracts, including the one tract that was not included in the Manteo Unit, and (ii) all POEs and all other future plans that petitioners were entitled to submit. See Marathon Br. 26-31. The OBPA prohibited the Secretary from "approv[ing] *any* exploration plan," "*any* development and production plan" or "*any* application for permit to drill" and from "permit[ing] any drilling," OBPA § 6003(c)(1)(C)-(F) (emphases added)—regardless of whether those plans complied with the OCSLA—for at least 13 months, and potentially forever, see *id.* § 6003(c)(3).[8] Thus, although the Secretary's OBPA-compelled failure to approve the Manteo Unit's POE in September 1990—even though it "fully complie[d] with the law," Pet. App. 194a, and, in the DOI's own words, was "approvable in all respects," *id.*—was an actual "breach by non-performance," *id.* at 76a, it was only one part of a larger repudiation of the government's performance.

The performance that the government promised to "exchange" was the government's adherence to the OCSLA's regulatory scheme and, in particular, its requirement of "timely and fair[] consider[ation]," Pet. App. 76a, of petitioners' plans and applications. The "essence" of the government's promise was *not*—as the government contends—merely to give petitioners a "priority," U.S. Br.

[8] In fact, the OBPA's general moratorium was not ultimately lifted until nearly six years after its enactment, and then only because the Act was repealed by Congress. *See* Pub. L. No. 104-134, § 109, 110 Stat. 1321, 1321-177 (1996).

36, over others in seeking necessary regulatory approvals. Any "priority" for government consideration would have been meaningless if the government did not in fact obligate itself to consider petitioners' plans and applications "timely and fairly." Indeed, if the government had not assumed the "necessary reciprocal obligation," Pet. App. 76a, of timely and fair consideration, the contracts would have been both illusory, see 1 R. Lord, *Williston on Contracts* § 1:2, at 11 (4th ed. 1990); *Winstar*, 518 U.S. at 921 (Scalia, J., concurring in judgment) (a " 'promise to regulate [you] in this fashion for as long as we choose to regulate [you] in this fashion' . . . is an absolutely classic description of an illusory promise"), and an act of utter "madness" on petitioners' part, see *id.* at 910 (plurality opinion). See Pet. App. 76a, 84a.

Nor can the government's breach be accurately characterized as merely an immaterial "delay" in the performance of the government's obligations. First, as enacted, the OBPA's "moratorium" was *indefinite*. See Marathon Br. 29. As late as April 1, 1996, the Court of Federal Claims found that "there is no evidence that the suspension will be lifted anytime in the future." Pet. App. 84a. No authority supports the proposition that announcement of a possibly perpetual delay of performance of a party's entire obligation is immaterial.[9]

Second, the contract's and the OCSLA's 30-day period for action on a POE meant that DOI was required to decide based on "available" environmental information, see 43 U.S.C. § 1346(d), and could not undertake new en-

[9] In fact, the "delay" here proved to be nearly six years—far longer than other delays in the government's performance of its contractual obligations that have been held to be material. *See Pinewood Realty Ltd. Partnership* v. *United States*, 617 F.2d 211, 215 (Ct. Cl. 1980) (one-month delay in conveying property); *Northern Helex Co.* v. *United States*, 455 F.2d 546, 550 (Ct. Cl. 1972) (two-year delay in payments); *Overstreet* v. *United States*, 55 Ct. Cl. 154, 174 (Ct. Cl. 1920) (five-week delay in payment).

vironmental studies in reaching its POE decision when the available information was itself adequate. See Mobil Br. 4 & n.3. A lessee willing to agree to justify a POE based on existing information may be entirely unwilling to pay more than $156 million for the right to do so against a moving target of ever-increasing and changing demands for new information. For example, here, the Secretary found the Manteo Unit's POE to be "approvable in all respects" when judged against the extensive available information in September 1990, Pet. App. 194a, but later noted not only that the OBPA required him to consider different information, see OBPA § 6003(d) (requiring the Secretary to undertake "socioeconomic studies"), but also that the OBPA Panel's "definition of adequacy [of information] . . . was *far more* restrictive and narrow than [his] charge under [OCSLA]." Pet. App. 201a.

In short, the OBPA denied petitioners the performance for which they had bargained in return for the more than $156 million they paid, and was therefore a material breach. As the trial court found, the OBPA "clearly reduce[d] the value and materially alter[ed] the structure and framework of plaintiffs' North Carolina lease acquisitions and permit approvals." Pet. App. 68a.

2. The government also contends that the OBPA's repudiation and actual breach were not "material" because, in hindsight, "exploration was concurrently stalled in any event" due to North Carolina's Coastal Zone Management Act ("CZMA") objections. U.S. Br. 39. As the government itself concedes, the critical issue in determining whether the government's breach of petitioners' lease contracts was material "is not whether petitioners could, in fact, *ultimately* achieve performance under the contract." *Id.* (emphasis added). Rather, whether the breaching party's repudiated performance was material must be measured no later than the moment of repudiation. See II Farnsworth, *supra*, § 8.16, at 443 n.3.

Any contrary "hindsight" approach to materiality would defeat a fundamental purpose of the materiality test: to allow a court to determine whether the breach gave the non-breaching party an *immediate* right to suspend its performance. See *id.* § 8.15, at 436; *id.* § 8.16, at 442; see also Marathon Br. 34-35. Moreover, a critical purpose of the materiality test "is to secure the parties' expectation of an exchange of performances," *Restatement (Second) of Contracts* § 241 cmt. b, and whether there was such an "agreed exchange," 5 Arthur Linton Corbin, *Corbin on Contracts* § 1107, at 575 (1964), is necessarily determined at the time of the contract.

Here, at the times the contracts were entered and repudiated, the government's "timely and fair[] consider[ation]" of petitioners' plans and applications was undoubtedly material because it formed the critical performance that the government agreed to provide in exchange for the more than $156 million petitioners paid up front. Moreover, at the time of the repudiation in August 1990, as the government conceded below, absent the OBPA, "timely and fair[] consider[ation]" would have meant approval. See U.S. Fed. Cir. Br. 39; see also Pet. App. 194a. Furthermore, North Carolina did not file its CZMA objection to the Manteo Unit's POE until November 1990, three months *after* the OBPA's repudiation, and the Secretary of Commerce did not decline to override that objection until September 1994. Marathon Br. 14-15 & n.10. Indeed, North Carolina's strenuous efforts before and during August 1990 to obtain enactment of the OBPA would have been nonsensical if it were already clear that exploration would be stopped by the State's CZMA objection.[10]

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[10] The government misleadingly creates the impression that petitioners' leases were already suspended immediately prior to the OBPA's enactment in August 1990 by its repeated statements that the "lease suspension first went into effect *before* the OBPA was enacted, in July 1989." U.S. Br. 44; *see id.* at 10. This refers to

Even viewed with 20/20 hindsight—which is *not* the legally proper approach—the government's repudiation was material. For example, it is undisputed that, absent the OBPA, the Secretary would have approved the Manteo Unit's POE in September 1990. See U.S. Fed. Cir. Br. 39. Similarly, absent the OBPA, among other things, the same administration might well have overruled North Carolina's CZMA objection before or during 1992. See Marathon Br. 10-13. And North Carolina might have compromised to avoid this prospect. To be sure, because of the OBPA, exactly what would have happened is uncertain, but the law of contracts does not allow a defendant that has breached a contract to take advantage of uncertainly that its breach created. See *id.* at 46-47 (citing authorities).[11]

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a suspension under the 1989 Memorandum of Understanding ("MOU") that *expired* on June 1, 1990, when the DOI issued its environmental report. *See* J.A. 83; Marathon Br. 8. North Carolina's July 1990 CZMA objection to petitioners' NPDES permit application (not to their POE), which did not bar exploration, *see* Marathon Br. 12 n.8, and petitioners' response, merely made the leases "eligible for suspension under the MOU," U.S. Br. 31, "upon Mobil's application," J.A. 83. But Mobil had made no such application at the time the OBPA was enacted. Thus the DOI suspended the leases as a "[c]onsequen[ce]" of the OBPA on September 21, 1990. *See* J.A. 129. *See also* U.S. Fed. Cir. Br. 17 (leases were suspended "[i]n light of the enactment of the OBPA").

[11] The government also suggests that an award of restitution against the government would impose an impermissible "coercive sanction" against beneficial changes in environmental policy. *See* U.S. Br. 3, 38. This Court has previously rejected the same government argument that normal common-law monetary remedies for breach of contract are an improper "coercive sanction" when the government breaches a contract to comply with salutary regulatory changes. *See United States* v. *Winstar Corp.*, 518 U.S. 839, 882-85, 896-97, 903 & n.51 (1996) (plurality opinion); *id.* at 911, 917 (Breyer, J., concurring) (citing "environmental legislation" as example); *id.* at 923 (Scalia, J., concurring in judgment); *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 24, 29-32 (1977) (breach not excused by State's interest in "environmental protection and energy conservation"); *Missouri, K. & T. Ry.* v. *Oklahoma*, 271 U.S. 303, 309-10 (1926).

C. Petitioners' Remedy Is Not Limited To The Recovery Of Expectation Damages For Delay.

In its final argument to avoid the normal rules of restitution, the government implies that, even if the OBPA had materially breached petitioners' leases—which it did, see *supra*, at 1-9—petitioners' recovery should be "limited" to expectation "damages" for "delay." U.S. Br. 24, 43-44. But the government does not dispute the overwhelming authority cited by Marathon, see Marathon Br. 37-41, 46, including *Nash* v. *Towne*, 72 U.S. (5 Wall.) 689, 702 (1866), and *Restatement (Second) of Contracts* § 373 cmts. b, d & illus. 1, 10, that restitution for material breach is not limited by the amount of expectation damages, even when those damages are either, as here, uncertain, see *supra*, at 14, or even could be proven to be zero. Nor does the government dispute that the sole case it cites, *Sun Oil Co.* v. *United States*, 572 F.2d 786 (Ct. Cl. 1978), is inapposite because the plaintiffs in that case did not seek *restitution*. See Marathon Br. 42-43.

Restitution enforces the principle that contracts are based on consent. Thus, when there is a material breach or repudiation, restitution requires the "return of the consideration paid for an unperformed promise." *Restatement of Restitution*, Part I, intro. note, at 5 (1937). As the trial court found, petitioners never would have provided their consideration of more than $156 million in up-front "bonuses" without the government's bedrock promise of timely and fair consideration of their plans and applications. See Pet. App. 76a.

As with the government's other arguments, the government implicitly seeks a special exemption from the normal common-law rules. This Court has consistently refused to open that door because it would undermine "the Government's capacity as a reliable, straightforward contractor,"

Winstar, 518 U.S. at 886 (plurality opinion), "with the certain result of undermining the Government's credibility at the bargaining table and increasing the cost of its engagements," not only in federal property contracts, but in contracts implementing "federal regulatory or welfare" programs, *id.* at 884 (plurality opinion).

II. PETITIONERS DID NOT WAIVE THEIR RESTITUTION CLAIMS BECAUSE THEY DID NOT RECEIVE ANY POST-BREACH CONTRACT PERFORMANCE.

Finally, the government contends that petitioners "waived" any claim for material breach or repudiation because, by (i) submitting the Manteo Unit's POE to the DOI two days after the OBPA was enacted, (ii) contesting North Carolina's CZMA objections, and (iii) requesting suspensions of their leases, petitioners "demand[ed] and obtain[ed] . . . contract performance from the United States" after the repudiation and breach of their leases. U.S. Br. 41-42.[12] This argument contradicts settled law.

Petitioners' submission of the Manteo Unit's POE could not have been a waiver because "[t]he injured party does not change the effect of a repudiation by urging the repudiator to perform in spite of his repudiation or to retract his repudiation." *Restatement (Second) of Contracts* § 257 (1981). *Accord id.* § 257 cmt. a & reporter's note (collecting authorities); II E. Allan Farnsworth, *Farnsworth on Contracts* § 8.22, at 483-84 (4th ed. 1990); 4 Arthur Linton Corbin, *Corbin on Contracts* § 981, at 938 (1951); *Bu-Vi-Bar Petroleum Corp.* v. *Krow*, 40 F.2d 488, 492 (10th Cir. 1930); *Kostelac* v. *United States*, 247 F.2d 723, 728-29 (9th Cir. 1957). As Professor Farnsworth has explained, "the injured party's response

[12] The government's first two waiver arguments have themselves been waived because they were not made before the trial court. The government's waiver argument before the Court of Federal Claims dealt solely with petitioners' September 1992 requests to re-suspend their leases. *See* C.A. App. 1004.

in trying to save the deal does not amount to an election; that [injured] party is not precluded from reconsidering at any time before retraction and treating the contract as terminated." II Farnsworth, *supra*, § 8.22, at 484 (footnote omitted). Cf. *Friederichsen* v. *Renard*, 247 U.S. 207, 213 (1918) ("At best this doctrine of election of remedies is a harsh, and now largely obsolete rule, the scope of which should not be extended."). In short, "one who has received a definite repudiation is not to be penalized for his efforts to bring about its retraction and to get that which is his due without a law suit." 4 Corbin, *supra*, § 981, at 940.

This accords with the general rule that waiver of material breach requires that the nonbreaching party make an implicit "promise to perform in spite of" the breaching party's position that it will provide "only a *part* performance." *Restatement (Second) of Contracts* § 246(1) & cmt. c (emphasis added). No such promise can be inferred here because the government's position, to this day, *see* U.S. Br. 30-33, 37 n.17, is that it has not breached and thus has offered full performance at all times. See *Utex Exploration Co.* v. *Garwood*, 246 F.2d 547, 552 (10th Cir. 1957) (where defendant's "honest" but incorrect "construction of the contract" was that plaintiff lessee could not mine "green pillars," plaintiff did not waive that material breach by continuing to mine "red pillars"). Moreover, no waiver has occurred because petitioners have not in fact received or accepted any partial performance from the government after the breach. See, *e.g.*, *Restatement (Second) of Contracts* § 373 cmt. a; *id.* § 246(1); II Farnsworth, *supra*, § 8.19, at 458-59; *Restatement of Restitution* § 68 cmt. b (1937). Indeed, waiver would not occur here unless petitioners accepted "tangible benefits" such as "money and property" from the breaching party's post-breach performance. *Walbrook Ins. Co.* v. *Spiegel*, [1993-94 Transfer Binder]

Fed. Sec. L. Rep. (CCH) ¶ 98,020, at 98,307-08 (C.D. Cal. 1993) (not waiver to accept "intangible benefits" such as information provided pursuant to contract clause after breach). At most, petitioners' actions preserved the *status quo* in order to avoid forfeiture of their $156 million investment in the event that the courts determined that there had been no material breach. That is not a waiver. Cf. *Restatement of Restitution* § 68 cmt. b (not waiver where plaintiff "continues to perform only for the purpose of preserving what he had already invested in [his] performance").

The cases cited by the government do not hold that merely urging a breaching party to perform in full or preserving the *status quo* waives a claim for material breach. *Dingley* v. *Oler*, 117 U.S. 490 (1886), held that there had been no repudiation, only a partial breach, see *id.* at 501-04; and *Smoot's Case*, 82 U.S. (15 Wall.) 36 (1872), held that there was no breach at all, see *id.* at 49-50. All of the appellate cases cited by the government involved the plaintiff's acceptance of the *benefits* of the defendant's *partial performance after* the breach. *E.g.*, *ARP Films, Inc.* v. *Marvel Entertainment Group, Inc.*, 952 F.2d 643, 649 (2d Cir. 1991) (Plaintiffs' "decision to *continue receiving benefits* pursuant to the [contract] was tantamount to an election to affirm the contract." (emphasis added)).

Here, as the government concedes, petitioners' submission of the Manteo Unit's POE was, at most, "urging continued performance under the leases," U.S. Br. 42, and thus merely afforded the government the opportunity to retract its repudiation of the leases. The government refused to retract in April 1992 by refusing to approve the pending POE, despite the Secretary's certification that sufficient information existed to allow him to "consider approval of the exploration activities currently proposed." See Pet. App. 202a. Petitioners promptly gave notice that

a suit was being considered if then-pending legislation did not provide compensation, see C.A. App. 1005, 1008, and in fact filed suit in October 1992, see J.A. 2, shortly after Congress adjourned.

Nor did petitioners waive the OBPA's material breach by seeking the Secretary of Commerce's override of North Carolina's CZMA objections. Petitioners certainly did not receive any benefits from their administrative appeals because the Secretary of Commerce sustained North Carolina's objections. And petitioners likewise did not receive any "contract performance," U.S. Br. 41—*i.e.*, consideration under the pre-OBPA regulatory scheme—because the Secretary of Commerce's decision relied in large part on the "concerns" expressed in the OBPA's findings, and the later opinion of the Review Panel that it had created. See J.A. 247 (citing OBPA); see also *id.* at 224, 227 n.35, 232-33, 239, 244 (citing Review Panel's report).

Finally, petitioners did not waive the OBPA's material breach by requesting reinstated lease suspensions after the DOI announced on September 9, 1992, that it was lifting the OBPA-induced suspensions imposed in September 1990, and thus that the annual rental payments would no longer be stayed, see J.A. 165-66. First, lease "suspensions" are not the "contract performance," U.S. Br. 41, that petitioners bargained for; on the contrary, contract performance required timely and fair consideration of petitioners' plans and applications. See *supra*, at 2, 11. Second, petitioners' requests were based on (i) the OBPA's continuing interference with their contract rights, see J.A. 170-71, and (ii) petitioners' challenge to North Carolina's CZMA objections. See *id.* at 168-69; U.S. Br. App. 2a. Thus, petitioners did not seek any suspension to which they were not otherwise entitled either (i) because of the government's material breach, see Marathon Br. 33-35, or (ii) under the 1989 Memorandum of Understanding—

a separate contract which specifically provided for suspensions if North Carolina made a CZMA objection, see J.A. 83. Accordingly, the suspensions did not imply a "promise [by petitioners] to perform" despite the government's material breach, as *Restatement (Second) of Contracts* § 246(1) requires. See *Restatement of Restitution* § 68 cmt. b (it is not affirmance for a plaintiff to take a position that would be the same if there was disaffirmance); *Chicago Washed Coal Co.* v. *Whitsett*, 116 N.E. 115, 116 (Ill. 1917) ("accept[ing] payment" did not waive right to rescind when plaintiff had right to payment "whether the contract was canceled or not").[13] At most, the suspensions merely preserved the *status quo* pending resolution of this case.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

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[13] Not only were petitioners' September 1992 requests for suspension, *see* J.A. 168-71, made after they gave notice that a suit was being considered, *see supra*, at 18-19, their 1995 request, *see* U.S. Br. App. 2a, was made *three years* after they had filed suit for restitution for material breach.

DEC 30 1999

Nos. 99-244 and 99-253

Supreme Court, U.S.
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In The

Supreme Court of the United States

No. 99-244

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,

Petitioner,

v.

UNITED STATES,

Respondent.

and

No. 99-253

MARATHON OIL COMPANY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Having followed quite closely this contract dispute between the United States and two private oil companies, Marathon Oil Company and Mobil Oil Exploration & Producing Southeast, Inc. ("Petitioners" or "Lessees"), the American Petroleum Institute ("API") once again finds it critically important to request an appearance and voice its concerns. Initially, API joined as amicus curiae in the Petitioners' rehearing request before the Federal Circuit below, after the first panel decision revealed a fatal miscomprehension of the Outer Continental Shelf Lands Act ("OCSLA"), through which the nation's offshore mineral leasing program is administered. While the Federal Circuit panel did grant a rehearing, its second decision contained only a superficial correction of the court's damage to ongoing Outer Continental Shelf ("OCS") lease activity. Believing that the law now established by the Federal Circuit decision, if left unmodified by this Court, would permanently harm this nation's OCS leasing program, API respectfully submits this amicus curiae brief in support of the Petitioners.[1]

API is a petroleum industry trade organization representing approximately 400 companies engaged in oil and gas exploration and production in the United States. The vast majority of the oil and gas leases on the OCS are held by API member companies, and API members have bid

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

tens of billions of dollars at OCS lease sales. In Amicus Curiae's view, the decision by the Federal Circuit has so misconstrued basic contractual law governing OCS lease operations that the OCS legal landscape has fundamentally shifted. The import of that decision's flawed contractual analysis will alter the economic risk structure of the OCSLA crafted by Congress after decades of experience and study. API is gravely concerned that this reallocation of economic risk will not only harm the oil and gas exploration and producing industry, but might actually threaten the viability of the entire OCS leasing program.[2] Amicus Curiae respectfully urges the Court to reverse the decision below.

STATEMENT OF THE CASE

The case is a breach of contract action brought against the United States relating to mineral leases issued to the Petitioners by the Minerals Management Service ("MMS") in an area of the Outer Continental Shelf offshore the State of North Carolina. While not disturbing the finding of the Court of Federal Claims that the government, through Congressional interference, had materially breached its leases with the Petitioners, the Federal Circuit decision voided the lower court's restitution award. The panel majority, with Judge Newman dissenting, found that objections to the Petitioners' lease

[2] The Congress has declared that the OCS is a *"vital national resource reserve . . .* which should be made available for expeditious and orderly development. . . . " 43 U.S.C. § 1332(3) (emphasis added).

exploration plans raised by the State of North Carolina under the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1451, *et seq.*, essentially annulled all other concerns over the federal government's conduct. In so deciding, the court inflicted critical damage to the law governing OCS mineral leases that will have far-ranging and harmful effects on *all* holders of OCS leases. If the Federal Circuit's decision is allowed to stand, any future Congressional action thwarting an OCS lessee's existing contractual rights, if worked in tandem with state CZMA opposition, would authorize the federal government to confiscate the entirety of the lessee's investment in its lease – even if the federal government, as lessor, acknowledges that the lessee's exploration plans comply fully with all agency requirements. The damage to the OCS leasing program – the source of 25% of domestic natural gas production, and 22% of domestic oil production – could be severe.

The OCS mineral leases that are the subject of this dispute were issued by the MMS under the authority of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* OCSLA leases require lessees to pay up-front cash bonuses, followed by periodic lease rental payments, for the tracts they acquire. 43 U.S.C. § 1337. Under the OCSLA statutory scheme, an OCS lessee may thereafter prepare a Plan of Exploration ("POE") as part of the "exploration" stage of lease activity.[3] If recoverable

[3] As described in a leading treatise on federal oil and gas law, the POE will include:

> a description of the type and sequence of exploratory activities; a description of drilling vessels, platforms,

resources are found, the lessee may then submit to the MMS a Plan of Development and Production, or "POD," to continue on to the "production" stage.[4] In the course of filing either plan, the OCSLA further stipulates that the OCS lessee will certify that its activities will be consistent with the coastal zone management plan of any affected state that has an approved CZMA program. *See* 43 U.S.C. § 1340(c)(2) (applying CZMA certification requirement to exploration plans); 43 U.S.C. § 1351(h) (applying the requirement to production plans).

For exploration plans, the OCSLA provides that the Secretary of the Interior, who acts through the MMS, "shall approve such plan . . . within thirty days of its submission, except that the Secretary shall disapprove

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> and other structures to be used; the types of geophysical equipment that will be used; the location of each exploratory well planned; an oil spill contingency plan; an air-quality analysis; and other relevant geological and geophysical information. . . .
>
> If drilling affects a state with a federally-approved coastal zone management program, an Environmental Report (Exploration) must also be submitted. . . .

Patrick H. Martin, *Outer Continental Shelf Leases and Operating Regulations, in* 2 LAW OF FEDERAL OIL AND GAS LEASES, 25-1, 25-36 (Rocky Mtn. Min. L. Found. 1999).

[4] The POD "includes information similar to that in the exploration plan: the specific work to be performed; a description of drilling vessels, platforms, and pipelines together with safety and pollution control features and labor, material, and energy requirements; well locations; current interpretations of all relevant geological and geophysical data; environmental safeguards and safety standards; and a time schedule of the activities to undertaken." See Martin, *supra* at 25-38.

[the] plan" upon determining that (i) a proposed activity would result in a condition under 43 U.S.C. § 1334(a)(2)(A)(i) (which sets forth conditions for lease cancellation based on probable harm to life, property, or the environment), and (ii) the proposed activity cannot be modified to avoid such conditions. If the MMS disapproves an exploration plan for those specified reasons, the OCSLA expressly provides that the Secretary may cancel the lease and "the lessee shall be entitled to compensation. . . . " 43 U.S.C. § 1340(c)(1).

Finally, to aid this Court's appreciation of the background of this case, under 43 U.S.C. § 1351(h)(1)(B), the Secretary's initial approval of a POD includes a separate requirement, *not* applicable at the exploration stage, that the development and production plan either must have *already* received coastal zone consistency certification approval from any affected state, or the Secretary of Commerce must have already overridden the state's objection pursuant to 16 U.S.C. § 1456. If state CZMA approval or a Secretarial override cannot be shown in the first instance, 43 U.S.C. § 1351(h)(2)(A) carries the unique provision that the "lessee shall not be entitled to compensation [under the OCSLA] because of such disapproval [of the development and production plan]."

In the instant action, the Lessees prepared and filed a Plan of Exploration for their OCS leases pursuant to the OCSLA's exploration provisions, 43 U.S.C. § 1340. As expressly recognized by the Federal Circuit's decision, however, the MMS was prohibited from taking any action with regard to this POE by the Outer Banks Protection Act ("OBPA"), Pub. L. No. 101-380, § 6003, 104 Stat. 484, 555 (1990), enacted as a rider to the Oil Pollution Act of

1990, at the behest of the North Carolina delegation in Congress some nine years after issuance of the leases at issue.

SUMMARY OF ARGUMENT

The integrity of the leasing program established by the OCSLA, 43 U.S.C. § 1331 *et seq.*, is vital to this nation. The OCS program supplies an essential share of domestic energy production in addition to billions of dollars of non-tax governmental revenues. The grave and fundamental errors of hornbook contract law committed by the lower court in this OCS lease dispute have been soundly documented by the Petitioners. In reaching its result, the Federal Circuit decision has also devalued long-standing obligations of reciprocal contractual performance that make up the standard OCSLA lease agreement. Without doubt, the most disturbing aspect of the court's decision is the blanket denial of restitution or other compensation to an OCS lessee in the face of unilateral federal and state actions which thwart lease activity. Under the lower court's reasoning, every OCS lessee beginning lease exploration would now risk losing its entire lease investment – even if it complies fully with every MMS requirement. Amicus curiae respectfully requests this Court to correct these errors, to restore an OCS lessee's remedies of rescission and restitution, and to reaffirm the principle that "the United States does business on business terms." *United States v. National Exch. Bank*, 270 U.S. 527, 534 (1926).

ARGUMENT

A. The Federal Circuit Decision Destroys the OCS Lease Bargain.

1. The Decision Ignores the OCS Lease Terms by Focusing on "Permit Denials"

In describing the OCS Lessor/Lessee contractual relationship, the Federal Circuit decision on review recognized that the "[l]ease terms grant lessees the 'exclusive right and privilege to drill for, develop, and produce oil and gas resources' in exchange for an up-front cash bonus and periodic lease payments." See Mobil Petition Appendix ("Pet. App."), Docket No. 99-244 at 3a.[5] This statement captures the long-accepted understanding of the bargain struck by the parties to an OCS lease. In return for payments of up-front cash bonuses, followed by periodic lease rental payments, the lessee obtains the exclusive right, *if* its assessment of the leased property suggests further activity is warranted, to begin planning for the exploration and possible future development of the lease. Indeed, it was *at this very part of the lease process* – the filing of the POE – that the federal government's critical breach in this case – the eleventh-hour enactment of the OBPA – occurred.

The Federal Circuit's examination of the OCS lease relationship, however, stopped at this point. At first, the lower court seemed to recognize that the OBPA plainly interfered with existing contractual relationships: ("[t]o

[5] Citations to the decisions below will refer to the Pet. App. in Docket No. 99-244.

read the original contract between the parties as incorporating all future actions, whether by statute or regulation, by one of the parties would raise serious questions about illusory contracts, and perhaps questions of due process and other constitutional concerns.") Pet. App. 10a. But the panel majority then conducted a precipitous retreat: ("[i]n any event, because the outcome of the case does not turn on this issue, we need not further dwell upon it.") *Id.* Thereafter, avoiding any real focus on the impact of the OBPA on the government's contractual conduct, the panel majority locked its attention on a collateral issue involving an event subsequent to the POE filing, North Carolina's CZMA consistency objection.

The OBPA's enactment cannot be so lightly ignored. As correctly observed by the Court of Federal Claims, the OBPA *materially altered both the structure and framework of the Petitioners' leases, and the leasing process itself.* As such, the OBPA's new terms and conditions cannot be read into the Petitioners' leases. Moreover, as the court noted,

> common sense suggests that no sophisticated oil and gas company with many years of experience in drilling for oil in offshore leased tracts would knowingly agree to pay the huge, up-front considerations here involved for such tenuous and unilaterally interruptable drilling rights.

Pet. App. 63a.[6] This is a precise description of the nature of the government's breach in this case: the OBPA's "material alteration" of the structure and framework of the OCS lease bargain, and the attempted creation of

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[6] *Conoco Inc. v. United States*, 35 Fed. Cl. 309, 324 (Fed. Cl. 1996).

"tenuous and unilaterally interruptable" drilling rights. Indeed, the crux of this dispute is the OBPA's effect of *wholesale contractual frustration.* It is *not,* as characterized by the Federal Circuit, a mere sideline dispute involving a "permit denial" or a CZMA "consistency complaint." Notwithstanding the Federal Circuit's re-characterization of this case as merely involving the filing of a single POE and a resultant "denial of permits," there *are no* actual "denials" of either a POE, or a permit application, in the record before this Court, because the OBPA prohibited MMS from even acting on the Lessees' POE.

The Federal Circuit panel's misguided discussion of "regulatory denials" was essentially the remainder of certain lines of reasoning that had underpinned the Federal Circuit panel's initial opinion, but were later removed. As noted earlier, the initial panel decision contained numerous errors in describing the interaction between the OCSLA and the CZMA and the proper construction of an OCS lessee's "performance." First, the initial panel decision had misread the OCSLA to require a lessee to receive CZMA state concurrence for its POE or face lease cancellation without compensation. The panel based its rejection of the restitution remedy on the Lessees' alleged resultant "violation" of the OCSLA.[7] But in

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[7] Pet. App. 36a. (*Marathon Oil Co. v. U.S.*, 158 F.3d 1253 (Fed. Cir. 1998), superseded by *Marathon Oil Co. v. United States*, 177 F.3d 1331 (Fed. Cir. 1999)). The panel wrote that "[u]nder these circumstances, a lessee's options are to 'submit an amendment to such plan, or a new plan, to the Secretary of the Interior,' " *citing* 16 U.S.C. § 1456(c)(3)(B). Pet. App. 37a. But as amply demonstrated by Petitioners' arguments, the OBPA's serial delays would only have further frustrated their attempts to submit such an amended plan.

arriving at this conclusion, the court erroneously relied on 43 U.S.C. § 1351, the provision of the CZMA that applies to development and production plans, *not* plans of exploration. On rehearing, the panel corrected this error, by simply removing all direct references to § 1351.

In addition, the panel majority asserted that "North Carolina's legally valid objection to the consistency certification *left unfulfilled the requirement that the lessees demonstrate compliance with [all] applicable statutes and regulations.*" Pet. App. 12a. (Emphasis added.)[8] This statement finds no support in the CZMA, the OCSLA, or MMS regulations. The Lessees fully demonstrated "compliance with [all] applicable statutes and regulations," when adding the consistency certification, as called for by 43 U.S.C. § 1340(c)(2), to their POE filing. North Carolina's disagreement with that certification in no way establishes a failure by the Lessees to comply with the law.

The Federal Circuit decision under review now rests on a more narrowly-conceived legal analysis, *i.e.*, that North Carolina's CZMA consistency objection, per se,

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[8] The original panel decision had gone even further, and reasoned that "under the circumstances of this case, to treat the *denial of the POE* as a breach of contract by the Government would be to eviscerate these salutary protections of the nation's fragile coastal lands and waters." App. 34a. (Emphasis added.) In other words, the panel had so misread the statute that it believed that the MMS was entitled to deny an exploration plan on CZMA consistency grounds. Instead, 43 U.S.C. § 1340, the section of the OCSLA dealing with exploration activity, *separates* the CZMA consistency certification approval process from the MMS's decision to approve or disapprove the plan of exploration. Once again, the panel's decision on rehearing dropped its reference to a POE "denial."

annulled all other concerns over the federal government's contractual conduct. The CZMA objection, by itself, has thus been elevated far beyond its tangential role in this OCS lease dispute.[9] As shown below, the panel's final decision not only refused to address the federal government's own OCS lease obligation, and thereby continued to misconstrue the law and the terms of the OCS lease, but also continued to ignore the federal government's own public record position on the effects of the OBPA, and on the Lessees' lease performance.

2. The Decision Fails to Enforce Reciprocal OCS Lease Performance

The Federal Circuit cited Section 10 of the MMS's OCS lease form, noting that it provides that lessees "shall comply with all regulations and orders relating to exploration, development, and production." Pet. App. 10a. Clearly, the lease carries with it attendant regulatory requirements, but as discussed in more detail below, the record shows that the MMS strongly endorsed the Petitioners' own lease compliance and performance in entering into the exploration stage of the leasing process. Moreover, as noted by the Court of Federal Claims:

> The lease agreements do not specifically state the parties' obligations regarding exploration plans but provide that the lessees agree to 'comply with all regulations and orders relating to

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[9] To repeat: (1) there was no "denial" of the Lessees' POE by the MMS; and (2) there could have been no lawful denial of the Lessees' POE on CZMA consistency grounds.

> exploration.' Under the OCSLA and its regulations, exploration may only be conducted pursuant to approved exploration plans. Thus, in order to explore, plaintiffs are obligated to prepare and submit exploration plans. *The necessary reciprocal obligation is that the government will timely and fairly consider – not necessarily approve, but at least promptly consider – exploration plans properly submitted.*

Pet. App. 70a (emphasis added) (citing the MMS's express statutory duty under the OCSLA to approve or otherwise act on plans within thirty days of submission, 43 U.S.C. § 1340(c)(1)). Stated differently, "the contracts at issue provide that submission of plaintiffs' POEs is predicated on an *unequivocal governmental duty* to timely and fairly consider, though not necessarily approve, them." Pet. App. 72a (emphasis added). More tellingly, the Court of Federal Claims also recognized that:

> It is not necessary [to the finding of a contractual breach in this case] for plaintiffs to have actually submitted such exploration plans because it is clear [the United States] cannot and will not perform its end of the bargain as required by the OCSLA.

Pet. App. 73a. Thus, under the Court of Federal Claims' proper reading of Petitioners' OCS leases and the law of contracts, the Lessees are due restitution in this case even without consideration of their actual filing of a POE. *A fortiori*, the Lessees are entitled to restitution without consideration of an attendant POE filing event, *i.e.*, the lodging of North Carolina's CZMA objection.

3. The Decision's Misguided View of Lease Performance Cannot Support Confiscation of the Lease Bonuses

Avoiding analysis of the reciprocal obligations highlighted by the Court of Federal Claims, the Federal Circuit's decision instead attacked the Lessee's "performance." The panel majority repeatedly referred to the state's CZMA consistency objection to the POE, implying that such "environmental concerns" excuse or even validate the government's contractual misconduct. For example, the panel majority wrote that "North Carolina's legally valid objection to the consistency certification left unfulfilled the requirement that the lessees demonstrate compliance with applicable statutes and regulations, compliance with which was a prerequisite to obtaining the necessary permits and licenses." Pet. App. 12a. Two paragraphs later, the court starkly suggests that any finding of federal misconduct in the role played by the OBPA in Petitioners' lease delays would be tantamount to "eviscerat[ing] . . . salutary protections of the nation's fragile coastal lands and waters." Pet. App. 13a. These observations lack foundation.

The Federal Circuit's complaint of Petitioners' "nonperformance" completely ignored the fact that the MMS has repeatedly described the "lease performance" on the record in superlative terms. For example, the MMS Deputy Director characterized the 2,000 page Environmental Report prepared for the Lessees' Manteo project as "the most comprehensive body of environmental information

ever assembled on a proposed well in the history of the U.S. offshore drilling program."[10]

Moreover, at the time of its filing the MMS announced that the Petitioners' POE was the *most comprehensive exploration plan ever submitted to the agency*.[11] Finally, Interior Secretary Lujan publicly acknowledged that the Lessees' POE, as submitted, was "approvable in all respects" under all MMS requirements, and that the agency's hands were tied by the provisions of the OBPA – *not* by agency concerns over the "salutary protections of the Nation's fragile coastal lands and waters."[12] In other words, the government, as lessor, never asserted that the Lessees' project

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[10] 21 Environment Reporter, *Current Developments*, (BNA) June 8, 1990, p. 314; *see also* Fed. Cir. J.A. 949-50.

[11] September 29, 1990 MMS News Release. The MMS even submitted public comments strongly supporting the Lessees' request to the Secretary of Commerce to override North Carolina's CZMA objections. In these public comments, the MMS observed that:

> An unbiased consideration of the analyses and conclusions contained within the Final [Environmental Report] and the [Environmental Assessment] will result in a determination that no significant effects are expected in the area of the Manteo Prospect, or to the State's coastal zone resources, as a result of Mobil drilling a single exploration well nearly *39 miles* from shore.

MMS Comments, June 4, 1991 at p. 9 (emphasis in original).

[12] Pet. App. 13a; Fed. Cir. J.A. 963. Moreover, Amicus Curiae would note that, as the legislative history of the OBPA cited by Petitioners clearly reveals, North Carolina's CZMA "consistency objection" was merely a single weapon in a formidable political arsenal to oppose drilling off its coastline without regard to particular environmental impacts. Indeed, months before the State's consistency objection based on

raised serious "environmental concerns," and the Federal Circuit inappropriately introduced this issue into the lease dispute.

Moreover, the Federal Circuit found that the effect of the OBPA on Petitioners' leases was of no moment, because "appellees' failure to overcome North Carolina's objections resulted in a delay that preceded and extended throughout the period in which the OBPA was effective." Pet. App. 13a. This assertion is directly undercut by the federal government's own actions. The *MMS*, recognizing the dictates of the OBPA, issued *sua sponte* in 1990 a unilateral suspension of ongoing operations for the Petitioners' North Carolina leases based solely on the OBPA. Moreover, Interior Secretary Lujan stated publicly that the OBPA would require additional delays, and the preparation of additional studies, far into the development

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"insufficient information" *was even issued*, the public record confirms that North Carolina Governor James G. Martin had already announced, in correspondence to President Bush, that North Carolina was opposed to offshore drilling before the year 2000, regardless of the completion of any "new studies," or, for that matter, any showing of the absence of adverse impacts of Petitioners' exploratory drilling activity. See Scott Pendleton, *Offshore Drilling Ban Draws Fire*, THE CHRISTIAN SCIENCE MONITOR, July 6, 1990 at 8, *available in* LEXIS, News Library, Arcnews File (reporting Governor Martin's correspondence to the President, and his corresponding entreaty for help from the State's congressional delegation); Matthew Davis, STATE NEWS SERVICE, June 28, 1990 *available in* LEXIS, News Library, Arcnews File (describing the "solid front" formed by Governor Martin and the North Carolina congressional delegation to oppose offshore drilling).

and production stage of Lessee's OCS leases: "The objectives of any future . . . recommended studies will be reviewed at each phase of development."[13]

4. The Decision Alters the OCSLA's Economic Risk Structure

Even while acknowledging that the OBPA and subsequent events may have affected the Petitioners' rights to explore and develop their OCS tracts, the Federal Circuit nevertheless authorized the confiscation of Petitioners' up-front "bonuses," asserting that it could find

> no principled distinction between a lessee whose hopes for large rewards from such a lease are frustrated by a failure to obtain the necessary permits for exploration, and those of a lessee whose hopes are drowned by impossible weather, equipment failures, financial setbacks, or any number of other circumstances beyond the lessee's control. In either case, the lessee contracted for the exclusive opportunity to explore in a certain area; the inability of a lessee to explore, if not attributable to the Government, does not create an entitlement to any refund of the consideration paid to obtain the lease.

Pet. App. 15a. Thus, the court saw no "principled distinction" between *force majeure* or other accidental events, and the Congress's imposition, at the instance of the

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[13] *Report to Congress on the Findings of the North Carolina Environmental Sciences Review Panel* (April 6, 1992), Manuel Lujan, Secretary of the Interior, Fed. Cir. J.A. 414.

North Carolina delegation, of the political gauntlet of the OBPA.

In its ruling, the Federal Circuit's majority decision overturned a long-standing and vital principle underlying the essential OCS lease bargain: the OCS lessee's "huge, up-front considerations" are payment for the essential right to explore for oil and gas which *may or may not* be found. Restated, the reward of successfully finding and profitably producing oil and gas is balanced against the overarching risk, borne by the OCS lessee, that the oil and gas will *not* be found, or cannot be produced in profitable quantities. That risk includes the OCS lessee's exposure of not only the loss of its upfront bonus payments, but often the loss of additional substantial investments, involving many millions of dollars, devoted to initial lease exploration and development activity. Now, the Federal Circuit would expand the lessee's risk even further – finding a facile analogy between the risk of dilatory *force majeure* events or other contingencies, and the OBPA's serial array of governmental obstacles that completely stifled Petitioners' lease activities – and thereby toppling the bargain between OCS lessees and the government. In fact, as duly noted by the Petitioners, the Federal Circuit's decision casts into doubt a basic contractual balance underlying not only the thousands of currently outstanding OCS leases, but also an untold number of other highly valuable government contracts.

Judge Newman's dissent captures the essence of the Federal Circuit's error. When encountering the same passage from the majority opinion quoted above, Judge Newman recognized that

> [such an] analysis is not supportable by any legal or equitable theory. What [Petitioners] paid for was the right of exploration. [Petitioners] bore the risk that the exploration might fail to find oil or gas, but [Petitioners] did not bear the risk that exploration would be entirely barred, especially by the same party from whom it bought the right.

Pet. App. 21a. In Judge Newman's view, this case posed this fundamental question: "whether the government shall deal fairly and legally with its contracting partners." Pet. App. 18a. Casting the answer in the affirmative, Judge Newman recognized that the effect of OBPA, enacted in the midst of the CZMA consistency process for the drilling of an initial exploratory well, *"does not justify the federal government's confiscation of [Petitioners'] payment[s] for a contract entered into before any such objection[s] arose." Id.* (Emphasis added.)

This Court should correct the Federal Circuit's grave error in order to preserve the integrity of the OCS leasing program. If the panel's ruling is left in place, OCS lessees will be subject to a rule that allows the government to confiscate their entire lease consideration if a newly-enacted federal statute arbitrarily upsets both ongoing and future lease operations, which the CZMA consistency certification process also frustrates. If allowed to stand, this erroneous ruling would rearrange the entire economic structure of the OCSLA, thereby shifting enormous and unintended economic risks to lessees. And, as ably observed by the Petitioners, the Federal Circuit's decision creates an even larger uncertainty as to when the remedies of rescission and restitution are *ever* available against the federal government – effectively vitiating the

fundamental presumption underlying government contracting that "[t]he United States does business on business terms." *United States v. National Exch. Bank*, 270 U.S. 527, 534 (1926).

B. The Integrity of the OCS Leasing Program is Vital to This Nation

The widespread effects of the Federal Circuit decision on other OCS lessees and on the future of the OCS leasing program should lead the Court to reverse the Federal Circuit decision. The OCS leasing program is vital to the nation.[14] By the end of 1998, over eleven billion barrels of oil and 130 trillion cubic feet of natural gas have been produced under the OCS leasing program.[15] In 1998, the OCS accounted for fully 25% of domestic natural gas production and 22% of domestic oil production.[16]

At the end of 1998, nearly 8,300 oil and gas leases issued under the OCSLA existed on the nation's Outer

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[14] The Congress has declared that the OCS is a *"vital national resource reserve* . . . which should be made available for expeditious and orderly development. . . . " 43 U.S.C. § 1332(3) (emphasis added).

[15] *Statistical Highlights Fiscal Year 1997*, U.S. Department of the Interior, Minerals Management Service (1998); *MMS Offshore Stats, Third and Fourth Quarters 1998*, U.S. Department of the Interior, Minerals Management Service.

[16] *1998 OCS Oil and Gas Production v. Total U.S. Production; Safety, Leasing, Exploration, Production & Revenue Statistics;* U.S. Department of the Interior, Minerals Management Service (June 1999), http://www.mms.gov/eod/stats.htm.

Continental Shelf.[17] Additional leases have been issued by the MMS in 1999, and lease sales will continue into the foreseeable future. Over the last ten and one-half years alone, OCS lessees have paid the federal government over $6 billion in lease bonuses.[18] Indeed, the MMS collected over $1.4 billion in lease bonuses in 1997, and another $1.3 billion in 1998.[19] As of September of this year, over 84% of all oil royalties paid on Federal and Indian leased lands, and over 77% of gas royalties, came from the OCS.[20]

If the Federal Circuit's ruling is allowed to stand, all OCS lessees, as well as bidders at future OCS lease sales, will be faced with stark uncertainties regarding the OCSLA statutory scheme. The most disturbing aspect of the court's decision is the denial of restitution or other compensation to a lessee in the face of unilateral federal

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[17] *Mineral Revenues 1998, Report on Receipts From Federal and Indian Leases*, U.S. Department of the Interior, Minerals Management Service. The number of offshore leases rose 12.5% in 1998, from 7,359 leases in 1997. *Id.*

[18] U.S. Bureau of Census, *Statistical Abstract of the United States: 1997* (117th Edition); Washington, D.C. (1997); *MMS Revenue Collections, January-December 1998*, U.S. Department of the Interior, Minerals Management Service; *MMS Revenue Collections, January-September 1999*, U.S. Department of the Interior, Minerals Management Service.

[19] *Mineral Revenue Collections, January-December 1998, supra* n.18. Bonuses received in the first three quarters of 1999 totaled $159 million. *MMS Revenue Collections, January-September 1999, supra* n.18.

[20] *Mineral Revenue Collections, January-September 1999, supra* n.18.

and state actions thwarting lease activity. Under this reasoning, every OCS lessee beginning lease exploration would now risk losing its entire lease investment – even if it complies fully with every MMS requirement. As observed by the Court of Federal Claims, "common sense suggests that no sophisticated oil and gas company with many years of experience in drilling for oil in offshore leased tracts would knowingly agree to pay the huge, up-front considerations . . . for such tenuous and unilaterally interruptable drilling rights." Pet. App. 63a.

MMS lease records lend perspective to that court's observation: As of the end of 1998, only about 20% of existing OCS leases were in the "production" stage, meaning that wells had been drilled on those leases that were producing oil or natural gas.[21] Thus, the vast majority of existing leases issued under the OCSLA are still in (or again facing) the "exploration" stage of lease activity.[22] Considering that virtually all of these active leases are located offshore of states with approved coastal zone management programs, each and every one of these OCS lessees which pursues exploration will undergo the CZMA consistency certification process as part of its OCS

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[21] *Mineral Revenues 1998, supra* n.17.

[22] Between 1988 and 1998, nearly 4,100 exploratory wells were drilled on over 43,000,000 acres under lease on the OCS. *Mineral Revenues 1998, supra* n.17; *MMS Offshore Stats, Third & Fourth Quarters 1998, supra* n.15. Some OCS leases that are not currently "producing" could contain now-depleted wells, thus rendering those leases also subject to a return to the exploration stage of activity.

drilling plans.[23] Therefore, the import of the Federal Circuit's decision, which has shattered protections afforded to lessees that must use that process, has potential impacts on countless present, and future, lease planning efforts.

API is also concerned that the Federal Circuit's implicit endorsement of North Carolina's objection to the POE consistency certification due to the "inadequacy of information" will only embolden other coastal states that philosophically oppose offshore development to misuse the CZMA and OCSLA processes. In addition, the reasoning of the court's decision can only encourage other Congressional interference with OCS mineral exploration and development activity for overtly political reasons. Under the lower court's ultimate ruling, if such future Congressional action is accompanied by contemporaneous state CZMA objections, the government may breach its leases with impunity. Accordingly, the industry's incentive to bid for OCS leases, especially in new, frontier OCS areas, will be drastically undercut.

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[23] *See* 43 U.S.C. § 1340(c)(2) (applying CZMA consistency certification requirements to exploration plans); *cf.* 43 U.S.C. § 1351.

CONCLUSION

For the reasons stated above, the Court should reverse the Federal Circuit decision.

Respectfully submitted,

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In The

SUPREME COURT OF THE UNITED STATES

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

MARATHON OIL COMPANY
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF THE STATES OF CALIFORNIA, NORTH CAROLINA, OKLAHOMA, OREGON, AND WASHINGTON, AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI CURIAE

This case involves a contract dispute which pits Mobil Oil Exploration & Producing Southeast, Inc.("Mobil"), and Marathon Oil Company ("Marathon") against the United States. Central to the resolution of that dispute is the application of the Coastal Zone Management Act, 16 U.S.C. § 1451, et seq. ("CZMA"), to Outer Continental Shelf ("OCS") leases. It is this aspect of the matter which is of importance to the amici states. As discussed below, the authority which Congress in the CZMA granted to coastal states to review federal licenses and permits including those which relate to OCS activities is of great moment to these states. Thus, the amici states write here to explain fully the CZMA process and the manner in which it is integrated into the OCS process and to urge the Court not to alter the regulatory structure which Congress created.

Congress enacted the CZMA in 1972 in order to provide for comprehensive, coordinated planning for the protection and beneficial use of the coastal zone. 16 U.S.C. §§ 1451, 1452. At that time, Congress placed special emphasis on the objective of preserving the natural resources of the coastal zone both for this generation and for succeeding generations. 16 U.S.C. § 1452(1). In enacting the CZMA, Congress intended to establish an effective mechanism for the long term management of the valuable resources of the coastal zone by encouraging and assisting the states to exercise their regulatory authority through development of federally-approved coastal management programs. 16 U.S.C. §§ 1451, 1452; H. Rep. 1049, 92d Cong., 2d Sess. 9 (1972), reprinted in *Legislative History of the Coastal Zone Management Act of 1972, as Amended in 1974 and 1976 With a Section-By-Section Index* at 313 (U.S. Government Printing Office 1976) (hereafter, "*Legislative History of the Coastal Zone Management Act*"); *see also Secretary of the Interior v. California*, 464 U.S. 312, 316 (1984).

In the CZMA Congress encouraged the coastal states to develop coastal management programs through a system of

grants and other incentives with other benefits being available to a coastal state after its management program received federal approval. 16 U.S.C. §§ 1455(c)(8), 1456(b); *see also Secretary of the Interior v. California*, 464 U.S. at 316. Among the primary incentives which Congress included in the CZMA to encourage states to develop and implement comprehensive coastal management programs were the consistency provisions. *See, e.g.*, H. Rep. 878, 94th Cong., 2d Sess. 53 (1976), reprinted in *Legislative History of the Coastal Zone Management Act* at 939; H. Rep. 1012, 96th Cong., 2d Sess. 35 (1980), as reprinted in 1980 U.S. Code Cong. & Admin. News 7832, 7853; 136 Cong. Rec. H8068, H8069 (September 26, 1990) ("Congress provided two major incentives to encourage coastal states to develop coastal management programs: (1) financial and technical assistance in program development and implementation; and (2) the requirement that federal activities and projects, as well as federally-permitted activities, must be consistent with approved state programs (the federal consistency provision).")[1]

The federal consistency provisions subject federal activities and applications for federal licenses and permits to state review. In the case of federal licenses and permits for an activity affecting the coastal zone, if a state finds that the activity will not be conducted in a manner which is consistent with its federally-approved coastal management program, then the federal agency granting the license or permit is barred from issuing it. *See* 16 U.S.C. § 1456(c)(3). This "consistency" authority gives the coastal states with approved programs a great deal of influence over those federal licenses and permits including authority to prevent activities which are inconsistent with the states' programs from going forward.

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1. Congress last enacted substantive amendments to the CZMA in 1990. The legislative history of the House bill is found in the Congressional Record. *See* H. Rep. 881, 101st Cong., 2d Sess. 167 (1990), as reprinted in 1990 U.S. Code Cong. & Admin. News 2017, 2175.

The vast majority of coastal states have responded to these congressional incentives and have adopted coastal zone management programs and obtained federal approval of them. By 1990, Congress reported that 29 of 35 eligible coastal states and territories had received federal approval for coastal management programs and that those coastal zone plans covered about 94 percent of the marine and Great Lakes coastline of the United States. 136 Cong. Rec. at H8069.

Coastal states such as California answered Congress' call to better manage and protect the coastal zone by adopting and implementing coastal management programs, and those coastal states have a clear interest in insuring that the congressional strategy crafted in the CZMA is both clearly understood and fully applied. This interest is heightened in the area of OCS leasing, exploration and development where Congress has granted specific rights to the coastal states. *See* 43 U.S.C. §§ 1340(b), 1351(d) (provisions extending consistency review to OCS plans of exploration and development and production plans).

California's experience with the CZMA program is illustrative. California's coastal management program received federal approval in 1978. That approval then withstood a vigorous legal challenge from the oil industry. *American Petroleum Institute v. Knecht*, 609 F.2d 1306 (9th Cir. 1979).[2] Since the California program received federal approval, the California Coastal Commission, the agency charged with implementing California's program, has reviewed numerous OCS projects for consistency with the state's federally-approved program. While the state has on some occasions objected to OCS proposals, it has on many occasions been able to have its concerns resolved through the consistency review process and to concur.

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2. In fact, the American Petroleum Institute sought to enjoin federal approval of California's coastal management program in order to prevent the state from exercising its consistency powers. *See American Petroleum Institute v. Knecht*, 456 F. Supp. 889, 902-03 (C.D. Cal. 1978).

It is the position of California and the other amici states that the regulatory authority which Congress granted to them in the CZMA must not be compromised through this litigation. In particular, that authority must not be jeopardized by any holding that a successful bidder for an OCS lease somehow acquires an entitlement or other absolute right to explore and develop that lease. Rather, the amici states submit that in resolving this action, the Court should acknowledge the role which Congress crafted for the states.

SUMMARY OF ARGUMENT

1. The petitioners herein have asserted that the OCS leases which they acquired in 1981 gave them an entitlement to explore and develop the OCS offshore North Carolina. In making that assertion, the petitioners ignore the phased approach to OCS leasing and development which Congress adopted in the OCS Lands Act Amendments of 1978 and the role in the OCS process which Congress assigned to coastal states through the CZMA.

Congress adopted a phased approach to OCS leasing and development, and in so doing, Congress limited the rights which a successful bidder for an OCS lease acquires. As this Court held in *Secretary of the Interior v. California*, a successful bidder acquires only a priority over other interested parties. Moreover, those rights are further circumscribed because the CZMA grants coastal states with federally-approved coastal programs "considerable authority to veto" OCS exploration plans and development and production plans.

2. Mobil and Marathon acquired their leases in 1981 well after enactment of both the CZMA and the OCS Lands Act Amendments of 1978. Since November 1990 when North Carolina objected to the companies' plan of exploration because it was not consistent with the state's coastal zone program, the Secretary of the Interior has been barred from issuing a drilling permit to Mobil and Marathon. That bar has remained in effect regardless of the enactment of, or the repeal of, the Outer

Banks Protection Act ("OBPA"). The companies' real complaint in this case is not they have been barred from conducting exploratory activities but rather that Interior has not approved or disapproved their exploration plan notwithstanding their inability to proceed with exploration because of North Carolina's CZMA consistency objection.

ARGUMENT

I. THE OCS LANDS ACT AND THE COASTAL ZONE MANAGEMENT ACT GRANT SPECIFIC AUTHORITY TO COASTAL STATES OVER OCS LEASING AND DEVELOPMENT

Both in their petitions for certiorari and in their briefs on the merits, Mobil and Marathon assert that the OCS leases they acquired in 1981 gave them an entitlement to explore, develop, and produce the oil contained within those leased tracts. *See, e.g.*, Marathon Merits Brief at 4; Mobil Merits Brief at 2. It appears that the petitioners make these assertions in order to frame the context in which they make their arguments regarding rescission and restitution. While the amici states do not address those arguments on rescission and restitution, they do believe that it is important to present to the Court an accurate picture of the OCS leasing process including the limited nature of the rights conferred in an OCS lease and the manner in which the CZMA impacts those rights.

A. An OCS Lease Conveys No Entitlements

This Court has had occasion in the past to address the complex and highly regulated field of OCS oil and gas leasing. *Secretary of the Interior v. California*, 464 U.S. 312 (1984). Therein, the Court was addressing the question of whether an OCS lease sale was a federal activity which directly affected the coastal zone of an adjacent state and thus triggered consistency review pursuant to section 307(c)(1) of the CZMA, 16 U.S.C. § 1456(c)(1). In resolving that issue, the Court reviewed the OCS leasing and development process and relied

on the phased approach to OCS development in order to resolve the consistency issue. It is important here to examine the OCS process in order to provide the appropriate context for the resolution of the claims of Mobil and Marathon in this case.

In 1978, Congress enacted substantial amendments to the OCS Lands Act of 1953 in order to provide for "expeditious and orderly development, subject to environmental safeguards," of the resources of the OCS. 43 U.S.C. § 1332(3). At that time, Congress established four distinct phases in the OCS leasing and development process: formulation of a five year leasing program, 43 U.S.C. § 1344; preparation for OCS lease sales, the solicitation of bids and the award of leases, 43 U.S.C. § 1337; submission by the lessees of plans of exploration, 43 U.S.C. § 1340; and submission by the lessees of development and production plans, 43 U.S.C. § 1351.

As this Court noted in *Secretary of the Interior v. California*, 464 U.S. at 337:

> The leases in dispute here, however, were sold in 1981. By then it was quite clear that a lease sale by Interior did not involve the submission or approval of "any plan for the exploration or development of, or production from" the leased tract. Under the amended OCSLA, the purchase of a lease entitles the purchaser only to priority over other interested parties in submitting for federal approval a plan of exploration, production, or development. Actual submission and approval or disapproval of such plans occurs separately and later.

The Court's comment is equally applicable to the Mobil and Marathon leases at issue here.

In *Secretary of the Interior*, this Court reiterated on several occasions that the rights acquired by a successful bidder for an OCS lease were limited and qualified. *See, e.g., id.* at 317, 337, 342. While petitioners herein make the assertion that the leases gave them entitlements to explore and develop, those assertions are completely contrary to the holding of this Court in *Secretary of the Interior*.

B. The CZMA Further Qualifies the Rights Under an OCS Lease

Beyond the basic structure and requirements of the OCS Lands Act as amended, the consistency provisions of the CZMA also significantly qualify the rights which a successful bidder obtains with an OCS lease.

When the CZMA was enacted in 1972, Congress included section 307 (Interagency coordination and cooperation). 16 U.S.C. § 1456, Pub. L. No. 92-583, 86 Stat. 1285. As the House Committee on Merchant Marine and Fisheries explained, "This section contains requirements for the coordination and cooperation among Federal agencies and between Federal and State agencies, which will be necessary to achieve the purposes of this title, ..." H. Rep. 1049, 94th Cong., 2d Sess. 19 (1972), reprinted in *Legislative History of the Coastal Zone Management Act* at 322.

As enacted in 1972, the consistency provisions in section 307 of the CZMA did not refer to OCS activities. Rather, section 307(c)(1), 16 U.S.C. § 1456(c)(1), provided that federal agencies conducting and supporting activities that directly affect the coastal zone will do so in a manner which is consistent to the maximum extent practicable with federally-approved state coastal management programs. Pub. L. No. 92-583, 86 Stat. 1285. Similarly, section 307(c)(3), 16 U.S.C. § 1456(c)(3), provided that applicants for federal licenses and permits for activities that will affect the resources of the coastal zone had to certify that they would conduct their activities in a manner which was consistent with federally-approved state coastal programs. *Id.*

Anticipating the 1978 amendments to the OCS Lands Act, in 1976 Congress amended section 307(c)(3) of the CZMA to make the issuance of permits for OCS exploration, development and production subject to the consistency provisions of the CZMA. In 1976, Congress added section 307(c)(3)(B), 16 U.S.C. § 1456(c)(3)(B), which provided as follows in pertinent part:

> After the management program of any coastal state has been approved by the Secretary under section 1455 of

this title, any person who submits to the Secretary of the Interior any plan for the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.) and regulations under such Act shall, with respect to any exploration, development, or production described in such plan and affecting any land or water use in the coastal zone of such state, attach to such plan a certification that each activity which is described in detail in such plan complies with such state's approved management program and will be carried out in a manner consistent with such program. No Federal official or agency shall grant such person any license or permit for any activity described in detail in such plan until such state or its designated agency receives a copy of such certification and plan, together with any other necessary data and information, and until--

(i) such state or its designated agency, in accordance with the procedures required to be established by such state pursuant to subparagraph (A), concurs with such person's certification and notifies the Secretary and the Secretary of the Interior of such concurrence;

(ii) concurrence by such state with such certification is conclusively presumed as provided for in subparagraph (A), . . . ; or

(iii) the Secretary finds, pursuant to subparagraph (A), that each activity which is described in detail in such plan is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.

Pub. L. No. 94-370, § 6, 90 Stat. 1018. By so amending the CZMA, Congress created a substantial role for the coastal states in the OCS exploration, development and production processes.

When Congress amended the OCS Lands Act in 1978, it specifically incorporated section 307(c)(3)(B) into the OCS

exploration and development process. Accordingly, in the provisions of the OCS Lands Act that deal with exploration plans, and development and production plans, Congress provided that the Secretary of the Interior could not issue any license or permit for any activity described in the plan unless "the State concurs or is conclusively presumed to concur with the consistency certification accompanying such plan pursuant to section 307(c)(3)(i) or (ii)" of the CZMA. *See* 43 U.S.C. §§ 1340(c)(2), 1351(d).

Thus, through the OCS Lands Act as amended in 1978 and the CZMA, as amended in 1976, Congress vested in coastal states with federally-approved coastal management plans considerable authority over OCS activities. As this Court stated in *Secretary of the Interior*:

> Congress has thus taken pains to separate the various federal decisions involved in formulating a leasing program, conducting lease sales, authorizing exploration, and allowing development and production. Since 1978, the purchase of an OCS lease, standing alone, entails no right to explore, develop, or produce oil and gas resources on the OCS. . . . States with approved CZMA plans retain considerable authority *to veto* inconsistent exploration or development plans put forward in those later stages.

Secretary of the Interior, 464 U.S. at 340-41; emphasis added.[3]

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3. In *Secretary of the Interior*, this Court in addition determined that Congress did not intend that states with federally-approved CZMA plans review OCS lease sales for consistency pursuant to section 307(c)(1), 16 U.S.C. § 1456 (c)(1). In 1990 Congress amended section 307(c)(1) to broaden its applicability and to make clear that section 307(c)(1) would apply to OCS lease sales in particular. *See* H. Conf. Rep. 964, 101st Cong., 2d Sess. 669, 969 (1990), as reprinted in 1990 U.S. Code Cong. & Admin. News 2374, 2675 ("The conferees' principal objective in amending this section [307c)(1)] is . . . to make clear that outer Continental Shelf oil and gas lease sales are subject to the requirements of section 307(c)(1).") However, Congress did not alter the phased approach to OCS development which it crafted in the OCS Lands Act Amendments of 1978 or the

(continued...)

It is in this context of the coastal states' "considerable authority to veto" inconsistent OCS plans that the Court must resolve the dispute between Mobil and Marathon and the United States.

II. IN OBTAINING OCS LEASES IN 1981, MOBIL AND MARATHON DID NOT ACQUIRE AN ENTITLEMENT TO EXPLORE, DEVELOP AND PRODUCE OIL CONTAINED IN THE LEASE AREA

Regardless how this Court deals with the contract issues presented herein, its resolution of the case should not denigrate the authority over OCS activities which Congress has vested in the coastal states. Rather, the Court should acknowledge that authority in its resolution of this case. Also, at all times pertinent to this case, it has been clear that the OCS "oil and gas industry is a high risk business, and the industry accepts that some of its investments will not return producible oil and gas." *North Slope Borough v. Andrus*, 486 F. Supp. 332, 357 (D.D.C. 1979), *aff'd in part and rev'd in part*, 642 F.2d 589 (D.C. Cir. 1980); *see also Village of False Pass v. Clark*, 733 F.2d 605, 607 (9th Cir. 1984) (oil companies willing to spend almost a half-billion dollars to buy OCS leases even though chances of discovering commercial quantities of oil and gas were only about 28% and 37%).

At this point, the amici states believe that a few of the facts of this matter deserve particular attention.[4] Mobil and Marathon acquired their leases in 1981 and thus must be understood to have known that the "purchase of a lease entitles the purchaser only to priority over other interested parties . . . ." *Secretary of the Interior*, 464 U.S. at 337. At the time Mobil and Marathon purchased their leases, Congress had amended both the CZMA and the OCS Lands Act to state

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3. (...continued)
applicability of section 307(c)(3)(B) to OCS exploration, development and production activities.

4. These facts are taken from the briefs of Mobil and Marathon.

expressly that coastal states with federally-approved CZM plans had a major role in permitting OCS activities.

Next, Mobil and Marathon agreed in 1989 to submit a draft plan of exploration ("POE") to Interior in order to allow Interior to prepare an analysis of the environmental impacts associated with the proposed exploration activities. Interior completed that report in June 1990, but Mobil and Marathon, for unexplained reasons, delayed submission of the POE until several months later on August 20, 1990. In the interim, Congress adopted the Outer Banks Protection Act ("OBPA"), Pub. L. No. 101-380, § 6003, 104 Stat. 484, which barred Interior from approving any POE, development and production plan ("DPP") or permit to drill until the later of October 1, 1991, or 45 days of continuous congressional session following the Secretary's submission to Congress of a certificate indicating that he had received a report from an Environmental Sciences Review Panel and that he had concluded that Interior had sufficient information to carry out its duties under the OCS Lands Act.

Shortly after Mobil and Marathon had submitted their final POE to Interior, they submitted their POE to North Carolina for consistency review pursuant to section 307(c)(3)(B) of the CZMA, 16 U.S.C. § 1456(c)(3)(B). On November 19, 1990, North Carolina objected to the plan as inconsistent with the North Carolina coastal management plan. That objection has been in place continuously since November 1990. Mobil and Marathon have neither modified their plan to achieve consistency with the North Carolina coastal management program nor have they persuaded the Secretary of Commerce to override the North Carolina objection. Because of the North Carolina objection, pursuant to the terms of the CZMA, Interior has been barred since November 1990 from issuing a drilling permit to Mobil and Marathon. That bar continues in effect at this time, and it prevents Mobil and Marathon from acting pursuant to the POE.

In April 1992, pursuant to the OBPA, the Secretary of the Interior certified to Congress that Interior possessed adequate information to make a "reasoned decision" about the activities proposed in the Mobil/Marathon POE. However, he declined to approve the POE until the completion of studies

which the Environmental Sciences Review Panel had recommended. In addition, the Environmental Sciences Review Panel had determined that additional studies would be required before delineation or production wells could be approved, and the Secretary indicated that those studies could not "begin in earnest" until there could be a review of the initial exploratory drilling.[5]

Thus, in October 1992, nearly two years after North Carolina's consistency objection, Mobil and Marathon filed this suit in the Federal Court of Claims. They asserted that because the OBPA barred the Secretary of the Interior from either approving or disapproving their plan of exploration, the United States was in material breach of the lease agreement.

This context illustrates how narrow the issue in this case is. The companies' complaint is not that the OBPA prevented them from engaging in actual exploratory activities on the OCS offshore North Carolina. Rather, the companies' claim is that because the OBPA prevented Interior from approving their plan, the federal government had materially breached the lease agreement. However, the effect of the North Carolina consistency objection cannot be ignored. Because of that objection – an objection entered pursuant to a statutory framework which was in place well before these leases were issued[6] – Mobil and Marathon have never been in a position to receive the drilling permits necessary to engage in actual

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5. Mobil and Marathon both assert that because of the need for these additional studies, the OBPA constituted a bar to all further approvals for wells on their tracts. However, as is clear from the briefs of Mobil and Marathon, no consistency certifications for these activities ever have been submitted to North Carolina. Thus, the companies' assertion neglects the point that North Carolina has not even been given the opportunity to concur or object to those necessary consistency certifications. In the absence of North Carolina's concurrence or the Secretary of Commerce's override of a state objection, no other exploration or development and production activities could occur, notwithstanding the OBPA.

6. Congress also made clear that, with certain exceptions not relevant here, the exploration, development and production provisions of the OCS Lands Act were applicable to leases issued prior to the 1978 amendments to that statute. *See* 43 U.S.C. §§ 1340(b), 1351(a)(1).

exploratory activity. While the OBPA may have barred Interior from approving the exploration plan, the consistency objection barred Interior from granting any permits to drill on the leased tract and thus barred any actual exploratory activities.

The amici states do not take a position on whether the inability of the Secretary to approve or disapprove the POE under these circumstances constituted a material breach of the lease agreement. In reaching its decision on the question of breach of contract, however, this Court should recognize and give dignity to the role which Congress crafted for coastal states in the CZMA, including their role in reviewing and potentially objecting to OCS plans.

In particular, fifteen years after *Secretary of the Interior v. California*, this Court should not hold now that an OCS lease gives the lease purchaser an entitlement to explore and develop the lease. This Court held then that the purchaser obtained only a priority over others and that any exploration, development and production activities must be conducted in a manner which is consistent with federally-approved state coastal management programs. The companies here have not presented any argument for this Court to alter that holding.

CONCLUSION

For the foregoing reasons, the amici states urge the Court to reaffirm the role of states with federally-approved coastal management programs in the OCS process as expressed by Congress in the OCS Lands Act Amendments of 1978 and in the Coastal Zone Management Act and as expressed by this Court in *Secretary of the Interior v. California.*

Respectfully submitted,

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